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ABSTRACT

The 17 essays included in this book are designed to provide educators and other interested readers with contemporary perspectives on a broad range of themes and topics concerning the U.S. Constitution. The authors are a distinguished group of historians, political scientists, legal scholars, and jurists. The essays include: "The Achievement of the Constitution as Viewed by the Leading Federalists" (Thomas L. Pangle); "The Contributions of the States to American Constitutionalism" (George Dargo); "The Drafting of the Constitution" (Margaret Pace Duckett); "The Senate the Framers Created and Its Legacy Today" (Richard A. Baker); "The First Federal Congress" (Charlene N. Bickford); "The Confirmation Process and the Separation of Powers" (Hon. Patti B. Saris); "The Article III Judiciary--The Ideal and the Reality" (Hon. Kenneth F. Ripple); "Focal Themes and Issues for Teaching about the Federal Judiciary" (Kent Newmyer); "The Work of the Supreme Court and Sources of Information about It" (Jeffrey Morris); "The Institution of the Presidency under Article II" (Thomas E. Cronin); "The Constitution and the Conduct of Foreign Affairs" (David. G. Adler); "Does the Constitution Matter to the Presidency Today?" (Nancy Kassop); "Ratifying the Constitution: The State Context" (John P. Kaminski); "The Debate over Ratification in Virginia" (Richard R. Beerman); "The Debate over Ratification in New York" (Stephen L. Schechter); "The Constitution: A Political Document with an Ambitious Legacy" (James A. Henretta); and "Women and the Constitution: The Equal Rights Amendment" (Winifred Wandersee). (DB)

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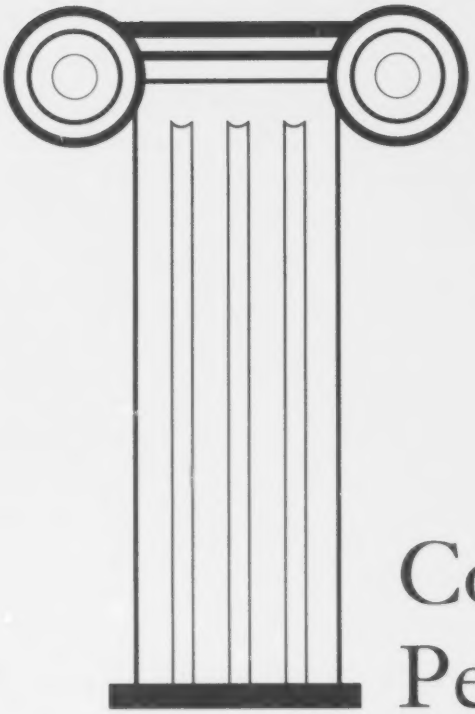

Contemporary Perspectives on the Enduring Constitution

A Bicentennial Primer

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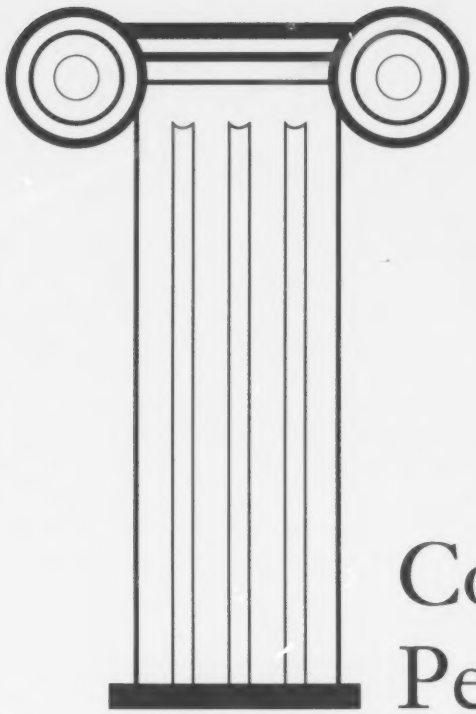

Contemporary Perspectives on the Enduring Constitution

A Bicentennial Primer

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Special Committee on Youth Education for Citizenship

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INTRODUCTION

In 1988, the American Bar Association Special Committee on Youth Education for Citizenship conducted the first of its summer institutes for teachers on the Constitution and Bill of Rights. It brought together an impressive array of scholars and practitioners who provided participants with knowledge, perspective, and insight. It challenged participants to explore the intricacies of these documents in ways that many had not considered.

The Institute was an exciting and stimulating learning experience for all who took part in it. Presenters remarked on the quality, enthusiasm, and knowledge of our participants; participants were likewise impressed by the willingness of presenters to share both knowledge and experience in ways that gave new meaning to the Constitution and Bill of Rights. Our staff, in particular, was gratified by the high level of professionalism and collegiality that both presenters and participants brought to the Institute. The mutual sharing of time, talent and energy that characterized the Institute was key to its success.

Planning for the Institute represented the best in collegial collaboration as well. Members of the ABA Special Committee and Advisory Commission on Youth Education for Citizenship worked with staff from concept to completion. As always, we are grateful for the counsel and support provided by this distinguished group of lawyers and educators; our efforts are enriched through their participation and commitment. I particularly wish to thank Dr. Isidore Starr. His long-standing commitment to providing quality educational experiences for teachers is evident in this Institute. In his own words, "We just have to provide this opportunity."

The Institute, too, reflects the scholarship, commitment, and hard work of YEFC project coordinator Howard Kaplan. His careful nurturing of the creative contributions of his colleagues resulted in an excellent and truly memorable program.

Mabel C. McKinney-Browning
Staff Director
Special Committee on Youth Education for Citizenship

ACKNOWLEDGEMENTS

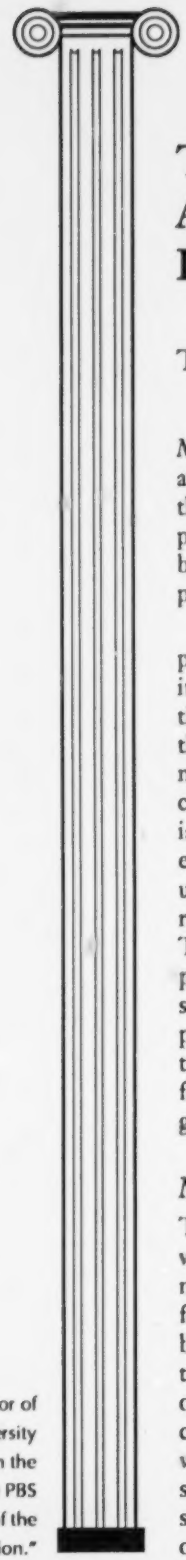
The essays included in this book are designed to provide educators and other interested individuals with contemporary perspectives on a broad range of fundamental constitutional themes and topics. They are based upon presentations made at the Leon Jaworski Constitutional Institute, conducted by the ABA's Special Committee on Youth Education for Citizenship at the University of Pennsylvania in June 1988.

In copy editing this collection of essays, a special effort was made to preserve the original flavor and immediacy of the oral presentations while at the same time maintaining high professional standards of readability and editorial consistency. This task was principally the work of Louise Kaegi, an experienced editor of legal and educational materials, who edited the initial transcriptions and worked directly with the authors on final edits and revisions of the manuscript. Also providing editorial assistance at various stages of the project were YEFC staff members Mabel McKinney-Browning, Howard Kaplan and Jack Wolowiec. Mr.Wolowiec, YEFC's Publications Coordinator, was principally responsible for coordinating and overseeing final production of this publication. Sara Podell, who served as an editorial intern with the ABA's Public Education Division during summer 1990, also provided editorial help in order to finalize the project. Sheila Donohue, a freelance designer, was responsible for the cover design, layout and typesetting of the book. Thanks are also due to the approximately 120 elementary and secondary educators, lawyers and other community resource leaders who actively participated in the week-long training conference.

Essential to this project were the contributions of the 17 authors whose essays appear in this book. The authors are a distinguished group of historians, political scientists, legal scholars, and jurists. They not only contributed to this volume through the initial preparation of their Institute presentations, but also worked closely with editors in revising and editing copy for final production.

Finally, this book would not have been produced without the financial support contributed through grants from the Commission on the Bicentennial of the U.S. Constitution (#88-CB-CX-0038), and the U.S. Department of Education (G008720289), as well as through additional funding from the ABA's Fund for Justice and Education and the Leon Jaworski Fund for Public Service.

The Foundation of the Constitution



The Achievement of the Constitution As Viewed by the Leading Federalists

Thomas L. Pangle

My aim is to clarify what the most thoughtful founders saw as the major achievement of their Constitution. I will proceed by locating the political thought of the Federalists in the tradition of the previous history of political philosophy. In order to appreciate properly what the Founding Fathers felt to be their key achievement, one must see clearly the major, the awesome, problem they faced and believed they had overcome.

That problem, simply stated is this: At the time of the founding, there prevailed an almost universal doubt about the viability, even the very possibility, of a large-scale republic. Those who opposed or looked with skepticism on the new Constitution appealed to or started from the widely held conviction that America had only two possible avenues of future development. Either the nation could (and should) remain a rather loose confederacy of small republican states, or the nation would inevitably evolve into a centralized, authoritarian, and eventually despotic form of government, dominated by a military or economic oligarchy. This opinion was grounded, in the first place, on the universal experience of all known history—never had there existed a stable republic encompassing more than one city or a federation of sovereign cities. There had indeed existed aggressively imperialistic republics—Rome being the premier example—but their successful imperialistic expansion had always sounded the knell of doom for their republican institutions. In the second place, this opinion had behind it the unanimous authority of all great political theorists of the past and present: The tradition of political philosophy manifested a firm consensus to the effect that the very nature of free, republican government demanded a small-scale, urban society—a *polis*, or "city."

Montesquieu's Articulation of the Consensus

The authoritative, traditional theoretical outlook was formulated with unrivaled depth and precision by the philosopher who was the most influential, the most frequently cited, of all philosophers among Americans at the time of the founding: Montesquieu, the author of *The Spirit of the Laws*. Montesquieu begins from the understanding of a *republic* as the form of government in which the people at large, or some substantial portion of the population, holds in its own hands the reins of power and responsibility. Now if this is to be truly the case, if a substantial portion of the citizenry is to have direct access to the wielding of governmental authority (partly by rotation of high offices), then the society must remain small, with the government close to the people. But mere smallness of scale is only one crucial precondition of republicanism. There are other preconditions, and conditions, which are even more arduous.

Thomas L. Pangle is Professor of Political Science at the University of Toronto. He served on the advisory panel for the PBS television series "Visions of the Constitution."

A society whose government is in the hands of the people—in the hands of committees and assemblies in which many or most persons participate—requires in its citizens an intense public spirit. Each individual must dedicate himself to the good of the whole and must be willing to sacrifice much time, energy, and material prosperity to political or public service. In other words, republican government requires "virtue" as does no other form of government. Montesquieu calls virtue the "principle" or the "spring" of republics. *Virtue* means here patriotism, love of country—but not as an abstraction; virtue means *fraternity*, a sense of brotherhood that unites the citizenry and makes each feel as a part of a more significant whole. Such patriotism, or fraternity, requires a genuine homogeneity in the way of life of the inhabitants. Only persons who share the same religious beliefs, the same education, the same family habits, the same economic status—who have grown up together, sharing the same decisive experiences of joy and sorrow—can look upon one another with an authentic sense of brotherhood. Virtue is therefore the love of equality, meaning the love of a society that prevents sharp distinctions or pronounced diversity.

From all this it follows that a sound republic cannot be "liberal"—that is, permissive or tolerant. The government, in the hands of popular assemblies and their directorates, must severely restrict luxury, conspicuous consumption, travel abroad, and religious and artistic innovation. The personal lives of citizens, especially their family life, where the crucial early education of children in habits of public dedication takes place, must be closely supervised by neighbors and fellow citizens. Individualism of all sorts—whether of excellence or of baseness—must be strictly limited and even discouraged. To find successful models of how republics work, in giving their citizenry enormous political liberty and responsibility at the cost of personal liberty, Montesquieu referred to the great classical republics like Rome, Sparta, and Athens and to the republics that flourished in northern Italy in the late Middle Ages. For the form of government that, in contrast to the republican form, gave its people considerable personal liberty, Montesquieu pointed to monarchy. He sharply distinguished monarchy from tyranny or despotism. Monarchy is a product of the evolution of feudalism in Europe, whereas despotism has its roots in pre-Christian Asia. Monarchy is the limited rule of one man, where power is checked and balanced by rival centers of power: an established church clergy, deeply rooted and geographically diverse; hierarchies of noble families whose authority is based on inheritance; and strong local magistrates in numerous cities who answer to powerful commercial interests in each city. Monarchy, in other words, is a mixed regime, where political power is distributed among very distinct, permanent, and competing classes, or "estates." Because power is so distributed, monarchies are "moderate" or undespotic, without placing much, if any, political power directly in the hands of the mass of the people. Various segments of the populace are subordinated to, and in some measure protected (though also exploited) by, the different centers of power.

The stability of the monarchic balance of power and, even more, the vigor and energy of its military and its politics depend on competition—between classes and estates but also among individuals within each class or estate. The "principle" or "spring" of monarchy, according to Montesquieu, is *pride*: a sense of honor that is not incompatible with a certain vanity. Monarchy requires, then, very little "virtue." Monarchies can be much more permissive than republics and can in fact encourage luxury, diversity, the freedom of women, erotic imaginativeness, and artistic individuality. Besides, monarchy not only allows, but requires, a large-scale nation state; it therefore promotes greater international security for its inhabitants and possesses far greater opportunities for commercial prosperity.

Montesquieu looked above all to England as the model for the kind of promise monarchy held out for human happiness, for England combined the traditional advantages of older European monarchies with a radical new openness to commerce, which in turn promised a fast growth in scientific technology and general material well-being for all. Moreover, England combined the traditional, more aristocratic estates with a House of Commons that gave sovereign legislative power to a substantial portion of the people—not directly but through the very indirect vehicle of "representation."

Montesquieu admired and even extolled the classical republic, with its noble sense of the common good and almost monastic self-sacrifice, but he ultimately rejected republicanism as placing demands on men that were contrary to human nature and, therefore, too fragile to be very practical and too prone to make men unhappy even when they were practicable. Now the conception of human nature to which Montesquieu appealed is one that he took over from his great teacher John Locke, and it is to Locke that we must turn to see most clearly the deep foundations of Montesquieu's thought.

The Lockean Conception of Human Nature

Locke is the classic, that is, the rhetorically most successful, exponent of the "state of nature" doctrine, a doctrine taken over by Montesquieu and generally accepted or endorsed by literate Americans at the time of the founding. When this doctrine was introduced by Thomas Hobbes it seemed to most hearers outlandish or fantastic. But such was the gentle power of Locke's, or his followers' sober rhetoric, that it came to be held as a popular article of faith. According to this teaching, man* is not—

*Man, men, and masculine pronouns are to be taken generically—that is as referring to all human beings—throughout these remarks.

as Aristotle and the great theologians of the Christian tradition had maintained—a "political animal" by nature. Politics or government is not "natural," but an artificial invention created by men to solve or overcome the terrible problems they "naturally" find themselves in. By nature, or before they use their reason to figure out how to "conquer" nature, men are in a chaotic state of anarchy where no one is secure in life, liberty, or property. Men are by nature not organized in any stable social structure but are rootless individuals, drifting in and out of various sorts of relations with one another. Men invent and enforce contracts and rules—especially the fundamental "social contracts" or "social compacts"—which set up political structures that give permanence and security to their lives.

While men have all sorts of natural drives and passions, which vary enormously from one individual to another, they have no generally agreed-upon goals, purposes or conceptions of "fulfillment." The one thing they do or can agree on is negative: a fear of painful death, which amounts to a goal of a kind, that is, maximizing personal and material security. Each individual cannot help but seek and demand, as his "natural right," life, liberty, and an opportunity to live in such a way as to be secure to pursue happiness however he may conceive it. Crucial to life and security are economic possessions or *property*, hence all men necessarily or "by nature" have a demand, and express a "*right*," to acquire and use property. All men seek these protections not solely for their individual selves but also for their immediate families, which are stabilized by laws of marriage contracts and laws regulating parental and filial rights and duties.

Government and political participation or leadership are not—in this view of human nature—ends or necessary, natural avenues for fulfillment. Government and civic virtue are means, tools or instruments, for providing more important goods than active involvement in government. The goal of government, or the public sphere, is the protection of the private sphere, which is individual and family life.

The American Innovations

This Montesquieuian-Lockean outlook was shared almost universally by all factions in early America—by Antifederalists as well as Federalists, by Canadians and Loyalists as well as revolutionaries, by most religious sects. To be sure, there were few who were strict Lockeans. In almost every mind, the dominant influence of the Enlightenment philosophers was muted and diluted by countervailing influences of both Judeo-Christian and Greco-Roman provenance. And of course some Americans saw more clearly what the full implications and the full problems were in the prevailing outlook.

Among the most far seeing were James Madison and Alexander Hamilton, the authors of *The Federalist Papers*. Indeed, this work is without a doubt the most profound and capacious of all the writings in defense and in explanation of the ideas underlying the Constitution.

The Federalists' Assessment of the Classical Legacy

Like Montesquieu their teacher, the authors of *The Federalist* look back with some veneration to the heroic figures of the ancient republics, brought to life in the pages of Plutarch's monumental biographies. The penname they chose, *Publius*, is the name of one of Plutarch's heroes, Publius Valerius Publicola, and it testifies to their keen sense of being the heirs to a legacy. Yet, while bowing to the classics and the classical republics, the new Publius also expresses severe criticism of the classics and a proud sense of independence and innovation. According to *The Federalist*, the model of the classical republic is in the final analysis unnatural and disastrous in itself, as well as inapplicable to and inappropriate for America:

> It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy. If they exhibit occasional calms, these only serve as short-lived contrasts to the furious storms that are to succeed. If now and then intervals of felicity upon themselves to view, we behold them with a mixture of regret, arising from the reflection that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party rage. If momentary rays of glory break forth from the gloom, while they dazzle us with a transient and fleeting brilliance, they at the same time admonish us to lament that the vices of government should pervert the direction and tarnish the luster of those bright talents and exalted endowments for which the favored soils that produced them have been so justly celebrated.
>
> ...If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends to liberty would have been obliged to abandon the cause of that species of government as indefensible.
>
> *The Federalist*, No. 9

In *The Federalist* numbers 9 and 10, the authors trace the reasons for the deficiencies, in their view, of the classical republican model: The virtuous republic is necessarily short-lived because it is impossible to repress for very long, without resorting to fear and violence, the natural diversity of mankind. That is a diversity of opinion—religious, moral, and political—but it is above all an economic diversity, an inequality and heterogeneity that inevitably arises from mankind's "different and unequal facilities of acquiring property." The natural distinctions among men lead necessarily to the development of factions, sects, or parties, and the small republic becomes very soon the scene of fierce partisan conflict—witness the turbulent histories of Rome, Florence,

Venice, and Athens. The dynamic of civil strife in popularly ruled assemblies is in the direction of mob rule and tyranny of the majority, which oppresses minorities and regularly gives rise to demagogues and military despots. Pericles in Athens is the example of the demagogue at his best, but usually the type is far, far less meritorious than was Pericles. The shifting whims of the mob or the militant majority render the rights and liberties of every individual insecure, constantly interrupt commerce and trade, discourage prudent management (both private and public), and lead to virtue being replaced by hypocrisy and fanaticism.

Yet, in America, the liberal or "moderate" mixed regime Montesquieu favors as an alternative is not possible. Americans will not submit to an established religion or church; the nation lacks both a landed, hereditary aristocracy and a royal family with hereditary title to the executive power. Besides, America is infused with a democratic spirit that reflects the essentially egalitarian character of its frontier society. America must, therefore, have a wholly republican form of government—but of a new, unprecedented sort. America must have a *liberal* republic or democracy, a political system that embodies Montesquieu's ideas in a new form and with a somewhat altered spirit.

It is this, the Federalists insist, that the opponents of the new Constitution (the Antifederalists) fail to understand. The Antifederalists refuse to confront the real problem, the new problem, America faces. They still think in terms of the old categories, the old choices, which simply do not fit the new situation. A clear sign of their disposition is their recurring complaint about the "innovativeness" and "hurry," or sense of emergency, inspiriting the Federalists. The Antifederalists are essentially conservatives, who (like so many conservatives) are trying to preserve what has already passed away and who, therefore, are entangled in basic contradictions.

On the one hand, the Antifederalists evoke nostalgia for the virtuous republics of old. But at the same time they are avid promoters of commercial growth and of the natural rights and liberties of individuals—especially in the private sphere. They do not seriously long for the total political commitment of the ancient Greeks and Romans; in fact, they want to minimize the role of politics and government. They are zealous in their adherence to the doctrines of the state of nature, the social compact, the rights of man—doctrines that arise from modern political philosophy and that do not reflect either a strictly biblical or a classical conception of human nature.

On the other hand, leading Antifederalists like Patrick Henry look to the British Constitution as the only model for a strong and free government. Yet they know, and admit, that this model is incompatible with the social conditions and political beliefs of Americans. As a result, they offer no alternative to the new Constitution. They call for simple government, kept close to the people, and see the threat of oligarchy or aristocracy looming in every form of government. But they cannot show that the existing state governments are or will remain simple and small enough to be close to the people. They do not really want to break up the states into smaller republics or try to instill classical citizenship with its awesome restraints. They admit the need for some national government supervening over the states, but they fail to show how it can be made either strong enough to perform the tasks it must perform or balanced enough to insure that it will not become oppressive.

Innovative Features of the New Constitutional Order

But these unanswered questions and unmet challenges are answered and met by the proposed Constitution. What are the chief features of the new, unprecedented, *liberal* republic?

1. Interest-group politics. First is the competitive, interest-group politics of a large, extended republican society. It is true that a large, diverse society renders impossible the classical goals of direct civic participation, homogeneity, brotherhood, and close mutual surveillance of and by the citizenry. It is equally true that this new larger republic lacks the permanent, clear, and deeply rooted class divisions and competition that moderate and animate Montesquieu's liberal monarchy. But this new republic does allow and foster a vast manifold of more petty and mutable competing interests—religious, geographic, ethnic, and especially economic. The diversity and heterogeneity make the formation of a uniform majority faction unlikely and creates instead the likelihood of the formation of shifting majority coalitions, promoting compromise and accommodation among the competing factions.

2. Representative government. This process, however, can work only if it is facilitated and channeled through appropriate governmental institutions, above all the institutions of *representative* government. Through elected delegates, the people—or the majority—retains control over the government without having to become directly involved in politics and without the possibility of the mob atmosphere found in old-fashioned democratic assemblies. Besides, representative government can tend to filter and refine public opinion. The men chosen by a mixture of direct and indirect electoral processes are likely to be more educated, articulate, and far-sighted than the average citizen, and the relative rarity of election days will make the public's judgment on those occasions more solemn and thoughtful. In other words, the system does presuppose and elicit some measure of civic spirit, moderation, and enlightened interest in government by many, if not all, citizens. But even if a large number of the elected representatives turn out to be men of narrow vision and mean passions, their vices will be checked, and

even channeled for the public good, by the need all will feel to appeal to a broad range of interests among their constituents in order to bargain and compromise with other, competing representatives. The extended sphere of the large commercial republic will foment a constant clash of competing groups that will keep all within bounds and induce policy judgments that take into account a very wide spectrum of needs and demands.

3. Separation of powers. Yet this mass of distinct, competing interests filtered through representatives is not sufficient to guarantee general liberty, security, and prosperity unless the representatives are, in addition, split up into competing institutions governed by regulations that guide the political give and take. The first and most deeply rooted such institution is the federal system or structure. The Antifederalists contend that in the new scheme the states are not strong enough. But the Federalists argue that it is the states that are in need of being supervised, for they are not as extended, not as diverse internally, as the whole nation and are therefore more prone to the ancient republican ills of majority tyranny and oppression of minorities. Moreover, they insist, the national government must be energetic and powerful in order to accomplish the tasks everyone agrees it needs to do—defense, regulation of interstate and foreign commerce, and so forth. The Federalists contend, therefore, that America should not rely mainly on the federal system, on the states' opposition to the national government, to check the national government. Instead, the principal control on the central government should arise from within from its own checks and balances among executive, legislative, and judicial branches. This separation of powers—yet another fundamental political principle taken over largely from Montesquieu—is therefore the real mainstay of sound republican guarantees, in the opinion of the Federalists.

The Separation of Powers: What It is and How It Works

I will confine myself to several general observations regarding the nature and workings of the separation of powers in the constitutional scheme. In Montesquieu, the divisions and competition between different branches and subbranches of government—between House of Lords and House of Commons, between King and Parliament, between courts with popular juries and king's officials—reflect the division and competition between distinct classes. In the American scheme, this basis for division of power does not exist, and a substitute must be artificially created. All the branches or subbranches have similar constituencies: all are either elected by popular majority or appointed by officers who are so elected. But each branch is given a part of the popular constituency selected in a different way and exercising its choice at a different interval or time. The hope is that different segments of the general public, or the same segments acting at different times, will be distinct enough to elect representatives who differ, compete, and keep one another honest. Moreover, their roles once in office are so defined as to make their personal interests—ambition, above all, but also economic advantage—necessarily competitive. Two farmers may be close friends back home in Iowa, but if one gets into Congress and the other gets appointed to a presidential commission, they are likely to come into conflict as well as to collude. The Federalists look with special hope to the Senate, whose members are selected from a large enough constituency, and for a long enough time period, to promote in them a longer range view of their ambitions and of the broad, national reputations they might win. The fears about the Senate expressed by some of the Antifederalists, namely, that the senators would become a kind of nobility or aristocracy, miss the point—a senator does not derive his or her prestige and power from any hereditary position or family history he represents or brings to his position as senator but solely from the institution of government to which he is elected. Hence a senator's interest and ambition is necessarily tied to, and regulated by, that institution, its rules, and its limited, competitive situation vis-a-vis the other major branches of government.

As Herbert Storing has suggested, the one branch of government in the American constitutional system that was and is most open to the sorts of doubts or fears the Antifederalists voice is the judiciary. The federal court system under the Constitution—and especially the Supreme Court—is a very undemocratic institution in its tenure, mode of selection, and largely secret mode of deliberation. What is more, the Supreme Court exercises an aristocratic, supervisory check on the more democratic legislative and executive branches as well as on the state governments. Yet, Storing pointed out, the irony is that the greatest success of the Antifederalists actually enhanced the role of this most aristocratic branch created by the new Constitution. For it was the agitations and complaints of the Antifederalists—seconded by Jefferson—which compelled the addition to the Constitution of the Bill of Rights and those ten amendments in the long run gave the federal courts enormous additional scope for the exercise of their powers.

Arguments For and Against a Bill of Rights

Indeed, one may say that the Antifederalists' struggle for the inclusion of a Bill of Rights, while it did lead to genuine and substantial improvement in the Constitution, reveals starkly the Antifederalists' limited understanding of the issues at stake in the great debate over ratification. The need for a national Bill of Rights, in addition to the existing state bills, presupposes a strong national government that can be checked only by a strong national judiciary and a strong national public opinion.

Yet by the same token, the Federalists' arguments against a Bill of Rights are rather weak, intrinsically, and

often verge on self-contradiction. Sometimes the Federalists go so far as to contend that a Bill of Rights is unnecessary because the Constitution they have proposed leaves the greatest power, and therefore the protection of rights, to the state governments! But in addition to this bizarre States' rights argument, the Federalists make the more telling point that the enumeration of certain rights in a set of written amendments may have the effect of disestablishing unmentioned but important rights. After all, *can* all the rights of man be neatly specified? Yet this argument would seem to be met, in part at least, by the exercise of great care in drawing up the wording of the amendments—the eventual Ninth Amendment is obviously a response to the concern expressed here. Generally speaking, the Federalists tend not to appreciate sufficiently what is perhaps the deepest or most significant Antifederalist argument for a Bill of Rights. Such a bill will have a profound educational effect, reminding citizens of the ultimate moral principles and limits or goals of the regime founded on the rights of man.

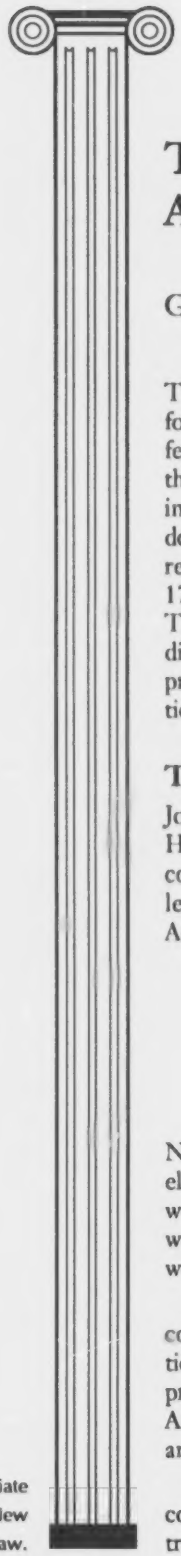
Conclusion: The Antifederalists' Question on Vision and Virtue

This reflection leads us to the most far-reaching Antifederalist criticism of the new Constitution and the spirit or thought behind it. This criticism the Anti-Federalists advance often and in manifold forms, but without complete coherence. Put simply, it is as follows: Is there sufficient cultivation of civic virtue, sufficient attention to the moral education and formation of the citizenry, in the regime being proposed? Is the populace at large adequately guided toward patriotism, toward a vigorous watchfulness, pride, and manly capacity to fight and make sacrifices to protect the rights of all individuals? One could add the allied question, is there adequate provision for encouraging and fostering men and women of unusual, rare political gifts—statesmen of vision and sublime ambition, leaders who will chastise democracy and the democratic spirit, who will stand against the inevitable tide toward exaggerated egalitarianism? Characteristically, the Antifederalists focus much less on this latter question or doubt. That is to say, they do not bespeak the classical or traditional republican spirit, with its focus on the superior political man within a republican setting. Similarly, the Antifederalists do not generally view politics as man's highest or noblest vocation.

In this key respect, the Federalists—especially Hamilton, in his great *Federalist Papers* on the Presidency—are closer to the spirit of classical republicanism. The Federalists respond to the Antifederalists' worry over the lack of provisions for education in popular virtue by arguing that love of country and willingness to become actively engaged in self-government are promoted above all by the spectacle of a vigorous and efficient national government, a government that earns the respect and gratitude of its citizens and arouses in some the vision of glorious and challenging national careers.

One must admit, however, in favor of the Antifederalists and their animadversions that some of those worries would have been shared by the great political philosophers of antiquity and even (perhaps) by Montesquieu. The philosophers' expressions of concern would indeed have taken a different form and been characterized by a different emphasis. The ancient philosophers would no doubt have been troubled by the absence of any strong restraint on commercialism, avarice, and acquisitiveness in the new regime; they would have deplored the unleashing, the all-out promotion, of economic competition for limitless private property accumulation and the attendant liberation of the selfish desire for gain. They would have regretted the absence or encouragement of some sort of collective religious sentiments or beliefs that would elevate somewhat the hopes, and restrain the hedonistic passions, of the citizenry. They would have looked askance at the fact that virtue, although it remains a genuine concern, is honored predominantly as a means, a necessary instrument for freedom and prosperity, rather than as a noble end in itself or source of intrinsic dignity. In the same vein, they would have been sorry to see the extent to which rare or outstanding statesmen, when they do arise, are viewed by the Federalists and their spiritual heirs as "*servants* of the people" rather than as embodying the goals, the purpose, of the regime and people.

Such criticisms, however, come from and express a way of thinking and living that lies largely outside the horizon of the debate between Federalists and Antifederalists. It is important that we remember that there exists such a radically un-American or pre-American republican tradition so that we do not commit the vulgar but prevalent error of identifying the alternatives available to us as human beings with the alternatives history or fate have imposed upon us. To be good citizens, that is, thoughtful, critical, *free* citizens, we need to study with some reverence the great debates that attended our founding and learn the intellectual and spiritual power of the protagonists, but we also need to try to see those protagonists as they saw themselves—as the initiators and the critics of something radically new, of a great "experiment," which opposed and must be seen in opposition to a previous great republican as well as monarchic tradition.



The Contributions of the States to American Constitutionalism

George Dargo

Through this bicentennial era, few people talk about the role of the states. The focus on the bicentennial has been almost exclusively, quite expectedly, on the federal Constitution. What we forget, however, is the extraordinary experience that Americans had prior to 1787 at the state and local level. Starting in 1776, in that extraordinary decade between 1776 and 1787, Americans right up and down the seaboard, from New Hampshire to Georgia, were busily drafting and redrafting written constitutions, so that when they came to Philadelphia in 1787 it wasn't as if they had marched up to Mount Sinai and taken down the Tablets of the Law. One of the reasons why the Constitution was the extraordinary document that it was, and has remained, is that it was built upon the real practical political experience that Americans had in fashioning state constitutions at the local level.

The Nature of Constitutional Development

John Adams wrote something very interesting to George Wythe of Virginia. His letter became a pamphlet that was circulated up and down the American coast and became one of the major models for constitution-making at the state level and ultimately at the federal level itself. At the very end of the letter Adams writes:

> You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity to making an election of government... for themselves or their children! When, before the present epoch, had three million of people full power and the fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?

Now this was early in 1776, before the Declaration of Independence, and eleven years before the federal Constitution. What Adams was talking about was the government of the states. The individual state constitutions, which were more important to the constitution-makers of the Revolutionary decade, I would submit, than the federal Constitution was when it came in 1787.

In sum, we have a very linear sense of constitutional development in this country. First are the colonial origins, the ancient times of American constitutional history; then the experiments at the state level in the 1776-87 decade preceding the Philadelphia Convention, culminating in the greatest act of American statesmanship, which was the Constitution; then the amendments, and then the doctrines of constitutional law, which came after.

I would like to suggest a different approach to the way we think about constitutionalism and our constitutional history. We do not have a single linear tradition but rather we have more than one constitutional tradition. We have

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at least two constitutional traditions, and perhaps as many constitutional traditions as exist at our state as well as our federal level. I wouldn't call them conflicting constitutional traditions, because in many ways they're mutually reinforcing. And it is, in fact, a matter of constitutional law that there cannot be a conflict between state constitutionalism and the federal Constitution because under Supreme Court doctrine, federal constitutional law always trumps state constitutional law when there is a conflict.

Differences Between the Two Constitutional Traditions

So we really don't have differences between the two constitutional traditions, but we do have more than one constitutional tradition. That is the main point that I want to make.

Let's enumerate some of the ways this other constitutional tradition differs from, although it also reinforces, the federal constitutional tradition we hear so much about and celebrate so much, particularly in this bicentennial era.

Frequency of Amendment

One difference is the frequency of amendment. Consider, for example, the Massachusetts Constitution, which was written and adopted in 1780. We celebrated it in Massachusetts, during the bicentennial of the Massachusetts Constitution, in 1980. It is as, a matter of fact, the only constitution from the Revolutionary Era still in existence. The Massachusetts Constitution has been amended 116 times. We in Massachusetts think of it as the oldest living, continuous, republican form of government in the world, preceding the federal Constitution by almost a decade. If you look at the two constitutions, you will see that there is a difference. The federal Constitution is very spare, very sparse, very skeletal and muscular, with only some twenty-six amendments. The Massachusetts Constitution, like many of the other state constitutions, is really quite long and verbose with numerous amendments. Many of them, of course, have been rewritten numerous times. That's one difference.

But frequency of amendment is not just a difference in form. There are implications in that difference. One is that the frequency of amendment means that state constitutions are more readily amendable than the federal Constitution and, therefore, that the amendment process is more a normal part of the political process. That shows that constitutional issues on the state level are political issues in a way in which federal constitutional issues are not. Federal constitutional issues in this country tend to be litigated. Lawyers carry off our political objectives on the federal constitutional level not through the political process but through the lawyering process.

Take, for example, the recent Supreme Court decision on gay rights, which upheld a state statute that made it a criminal offense to engage in sodomy. That decision gave rise to a great deal of justifiable protest in the gay community. But what was extraordinary about it is that less than a year ago there was a full-page ad in the *New York Times* addressed to the Chief Justice of the United States, signed by fifty or one hundred political scientists and law professors, calling upon the Court to go beyond that decision. That's an extraordinary thing when you think about it—using this form of political petition to bring about a change in a legal decision. But on the state level, constitutional issues are addressed the way political issues are addressed. They are part of the normal process of politics.

Role of Judicial Review

A second difference is that the role of judicial review at the state level differs significantly from its role at the federal level. There's an interesting constitutional law question as to who is the final arbiter of constitutional meaning. The general conventional wisdom is that it is the Supreme Court. What the Supreme Court enunciates is the law. While theoretically the people can overturn a Supreme Court decision by adopting an amendment it is very rarely done and is very difficult to do. But because constitutions at the state level are more readily amendable, it also means that judicial review as exercised by the highest courts of our states does not have the same finality that Supreme Court decisions at the federal level do.

For example, in Massachusetts in the early 1980s, the Supreme Judicial Court held that the death penalty was unconstitutional under the Massachusetts Constitution. In response, the people of Massachusetts, in their wisdom, amended the constitution to accommodate the objections of the Massachusetts Supreme Judicial Court. Then the Supreme Judicial Court said that a subsequent statute, passed under the new amendment, was still unconstitutional. Thus, what you had was an interesting dialogue among the people, the legislators, and the Supreme Judicial Court. That shows that judicial review, while it exists at the state level, does not exist in the same way as it does at the federal level.

Diversity in State Constitutions

The third difference is suggested by the great variety of state constitutions. How does one teach a course in state constitutional law—a subject of growing academic interest, by the way? You can decide that you have fifty hours and each state gets one hour. But I do it in a more generic way, in terms of principles and approaches. When you look at the various state constitutions, however, you see that they're not the same. There's a great diversity in American constitutional law at the state level, which, after all, fulfills one of the major virtues of American federalism, what Louis Brandeis called the experimental feature of American federalism. The states serve as laboratories for experimenting in new approaches to

public issues, to social issues, to questions of rights, for example. So, that's a third difference.

The Concern for Federalism

The fourth difference is that the federal Constitution and federal constitutional questions always elicit what is called a "concern for federalism." One of the limitations in developing constitutional rights at the federal level is that we do not want the federal government to do everything. We want to leave some jurisdiction, some power, some leverage to state and local government. Therefore, while we may think as a matter of policy that it may be good for the federal government to go in a certain direction, either through an act of Congress or through a decision by the Supreme Court of the United States, we don't do it because of what is called the "concern for federalism."

Let me give you an example. There is in federal constitutional law what we call "the state action requirement." The state action requirement means that for almost all of the protections we have under the federal constitution, the actor—that is, the agency or the entity that is depriving someone of a right or rights—has to in some way be the state. Generally speaking, you don't have a right against private persons, only against the state. That's called "the state action requirement." It's not clearly in the Constitution and I don't want to debate it. We could talk about that. But what I want to suggest is that the states are not necessarily bound by state action requirement as a matter of state constitutional law. One of the reasons why the federal government, and particularly the Supreme Court, has adhered to the state action requirement for many, many years, over a century now, is that it allows the states to either keep a state action requirement, or abandon it if they chose to do so. The state action requirement is illustrative of the point that federal law is limited by the "concern for federalism." State law is not necessarily bound by that same limitation.

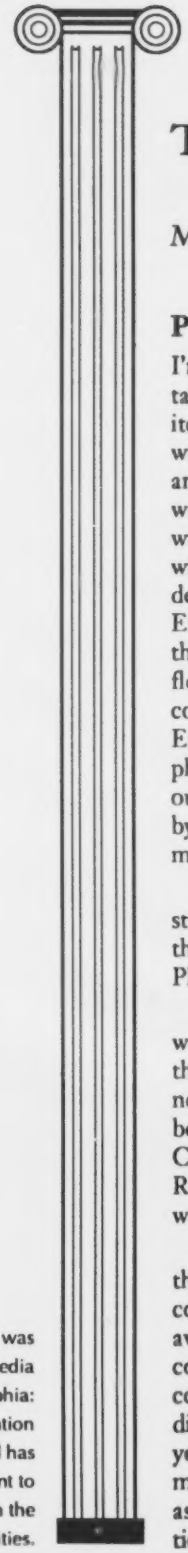
Renaissance in State Constitutional Law

State constitutional Law is becoming an important subject because of the issue of rights. There has been in the past ten to fifteen years what we call a renaissance in state constitutional law. There are lots of interesting reasons for this. Some are historical and some rest on other bases. There has been a tremendous growth in the literature on state constitutional law; there are courses given now to law students in state constitutional law, and state courts are becoming much more concerned about their own state constitutions. Some state judiciaries, for example, have been warning the practicing bar for the past few years that if they don't raise state constitutional law claims, as well as federal constitutional law claims, they may in fact be guilty of malpractice. The point is that at the state level there has been a growth in the development of rights that do not exist as a matter of federal constitution law but that may exist as a matter of state constitutional law.

Consider a couple of examples. As a matter of federal constitutional law there is no right to a public education. The Supreme Court has never recognized such a right. If a state offers public education, it must do so on an equal basis so that everybody has an equal opportunity to the same education so long as it is offered. But as a basic right, while the Supreme Court has come close to recognizing it, it has never recognized education as a matter of federal constitutional law even at the elementary level. As for the right to a clean environment—federal constitutional law has never even come close to recognizing this as a right. But there are states which recognize one or both of these. Some states have it written into their own bills of rights and declarations of rights.

On the level of rights, particularly in an era of cutback, when we have, as we do now, a conservative Supreme Court, the Rehnquist Court, certainly we do not expect any great breakthroughs as a matter of federal constitutional law in the next few years. We can only hope to hold the line. That's what we've been doing in the past ten to fifteen years, ever since the Warren era came to an end. We don't expect any new beachheads in the development of rights. That's one reason why people are looking more and more to the state level rather than the federal level to define new rights as we go from the bicentennial into the next century of American constitutional history.

In closing, I want to say that we must always consider the states to be part of our constitutional tradition, going all the way back to the eighteenth century but also coming right into the present and extending into the future. And let's remember that the federal Constitution is an incomplete constitution without the state constitutions that preceded it and continue to energize and sustain it.



The Drafting of the Constitution

Margaret Pace Duckett

Profile of the Delegates

I'm really delighted to follow the first two speakers. First, Tom Pangle, who talked about the kind of thinking that our drafters of the Constitution inherited. Certainly they didn't just appear that summer for four months in 1787 without very, very deep roots in the past, in Montesquieu's theory of a republic and the separation of powers, in Locke's social contract, in David Hume, all the way back to the Romans and the Greeks. They really studied and knew these writers. In fact their educational levels were remarkable even in comparison with Europe, with respect to their level of scholarship and their numbers of degrees. Actually one interesting difference between the philosophers of Europe writing about these issues and our Founding Fathers here working on them was that the Americans had the absolutely extraordinary chance to put flesh and actual machinery on the ideas, in a practical sense, and see if they could make them work. In contrast, the Europeans especially excelled in the Enlightenment areas in science, in literature, in the fine arts, and in philosophy, the Americans excelled in government, law, and economics. That is where our forte was so strong. We were a new country unfettered by class distinction, by monarchy, by feudalism, so that our forebears could take the ideas and try to make them work.

Second, I'm certainly pleased that George Dargo talked so much about the state constitutions. The states were what were so critical in the 1780s, and these men came as citizens of Virginia, Massachusetts, when they came to Philadelphia.

It was an amazing assembly of men. What made them work so well together was perhaps not only that they had had remarkable education but that during the Revolutionary era they had a bonding, an experience that made them by necessity work together. Six of them had been in Philadelphia eleven years before, signing the Declaration of Independence. Twenty-four had served in Congress. Thirty-four were lawyers. Thirty-three of them had fought in the Revolution together. Fifteen had worked in the committees in their states to write their own state constitutions.

If you talk about the Founding Fathers, sometimes our students think of them as these august gray-haired gentlemen in wigs. If you analyze the composite and individual characteristics of the delegates, you will see that their average age was 42. They were young; they were energetic. They were coming to Philadelphia expecting a challenge. Their personal lives were colorful and passionate. Two died in duels. One was poisoned. One just disappeared from a hotel room. (That was in New York, not Philadelphia.) If you look at the background of these men, you certainly see living, breathing men with enormous practical experience who came to this city with the aspirations of the Revolution, the hopes for which they had fought the Revolution still very much in their minds.

Margaret Pace Duckett was Chairman of the multimedia project "Miracle at Philadelphia: The U.S. Constitutional Convention Bicentennial Exhibition" and has been nominated by the President to the National Council on the Humanities.

Government Under the Articles of Confederation

Let's go back for just a minute before the delegates arrive in Philadelphia for the Convention to remember that when they came from their thirteen states, they were organized under a loose Articles of Confederation that was the only existing central government. It consisted of only one branch of government, the Congress, meeting in five different homes, when it could muster a quorum, with no power. The states were where the control lay. They were able to make their own laws; they were able to print their own money; they were able to have their own armies; some even had navies. They created their own commercial laws of trade, and if one state wanted to protect itself against its neighbor it would build a barrier of trade regulations. New Jersey at one time said they felt like a keg, tapped at both ends with the ports of New York and Philadelphia siphoning trade out to either side. These states were only loosely grouped together under the Articles of Confederation and highly competitive.

Practical Problems

When the war was over and the Treaty of Paris signed in 1783, the men were glad to return home. Many of them moved West to settle; the ones that came to the East Coast were trying to find new jobs to get trade going, with few markets still available. England had closed the borders; their ports were no longer amenable to our goods, so we needed new markets desperately. The young country had problems to solve of a very practical nature at the end of the war, as well as enormously fertile possibilities. Some of the large states were just beginning to settle their western lands, where there were threats outside their borders by other countries, almost snapping at their heels.

On the national level Congress was frustratingly weak. They didn't have the power to tax, to pay back the debts. They didn't have the power to control commerce, to help our goods begin to flow. Abroad there were international problems: Spain had just blockaded the Mississippi, so the goods couldn't go downstream, and as our trading ships entered the Mediterranean, looking for ports, pirate vessels were capturing our men as hostages, and there was no way to begin to combat that problem. It's these kinds of real issues, practical issues in addition to ideas, that bring fifty-five men to Philadelphia—and George Washington, reluctantly, out of three years of blissful rest at Mount Vernon.

What Was Happening in the Disunited States

Perhaps the thing that frightened Washington and many of the national leaders most was what was happening in the states themselves. The way that the capricious states tried to solve their problems was often causing confusion and conflict. In many cases, if a law needed changing, it was easier at the state level where they could change anything. If money was needed in the state, they would print more, and every state had enormous pressures to pay back the debts after the war and get the economy viable again. In Massachusetts, for example, Shays's Rebellion had taken place the winter before. The debtor farmers had stormed the arsenal at Springfield, taken up arms, not wanting to pay back their debts in the currency of the time. They were trying to take things in their own hands by force. In Rhode Island they chose a much more practical method and began to work at the polls in which they were shortly to be successful. In Rhode Island, where the legislatures were voting reprintings of money rapidly, this was terrifying some of the more stable and more conservative factions up and down the East Coast. It was this factionalism going on, this battling back and forth, in the state legislatures and in the Congress that really made people anxious about the state of our country. These aspirations were there to build the new country, but problems were pressing on the minds of the delegates.

The Philadelphia Convention

The chance to do something new was uniquely possible; it was a rare moment in 1787 for the delegates to come to Philadelphia. The city where they would meet would have been only nine blocks wide, Market Street truly had a market stall, and on the river a newly invented steamboat was about to be launched. There delegates were meeting in the hall where independence had been declared; Washington was staying in his friend Robert Morris's house, and the delegates would retire to the various taverns and boarding houses after four to six to seven hours' work, hard work for the entire period, except for a five-day break for an actual drafting. And although it's impossible to know, we only wish we knew what they were talking about as they walked those streets and sat at those taverns and met with their fellow states, representatives, members of various coalitions that formed among the groups.

Inside Independence Hall: Rules of the Convention

We do have an absolutely remarkable record of what happened once they entered Independence Hall. We know because of James Madison. Madison was a student you all would have wished to have taught. He had studied extensively, before he arrived at the Convention, the history of past states, the history of past government, since he wanted to understand why republics had worked or hadn't worked, and he came with a plan in mind. He said he would sit at the front of the Convention and take notes each day so that posterity would have a record of what had transpired. Otherwise, the freedom of the press did not apply. You would never have known what went on since, in fact, the rules of the Convention were very clear. Each and every word that passed should remain secret within the Convention and not be made public until leave was given by the chairman, until the end of the Conven-

tion. An issue brought up and voted on could be re-opened over and over again, and some were reconsidered twenty or thirty times. This phenomenon allowed them a changing of mind, a refocusing, a reevaluation, as that careful balancing that went on all during the Convention took place. That rule of secrecy and the freedom to reevaluate gave a chance for absolute candor.

Consensus on Basic Issues

Now, when they began their debates, we know some of the things they argued about so intensely as the drafting process began, but over all they agreed on most basic ideas. They came with a like mind on many issues that they had learned from both experience and education. They wanted to increase the powers of the central government because they knew it was absolutely necessary. They wanted a regulation of commerce, a chance to pay back the debts owed to foreigners, to lenders, and to the soldiers. They wanted a stable government. They wanted to provide for common defense and for a general welfare—the *res publicae*, or the public things, that needed doing which one state individually could not. They wanted three branches of government so that one would not usurp and run away unchecked without powers, and they knew they needed a written law to give them something stable and durable that could not easily be changed.

Conflict on Representation

The conflicts began the first week of the Convention, when the Virginia plan, authored largely by James Madison, was laid on the table by Edmund Randolph.

The Virginia plan. The delegation had gotten there early; Virginia had created a plan, much of whose elements are familiar. They wanted three branches of government separated from each other with a single person as president. The legislature would be bicameral, and both branches would be proportional to the population. The people would directly elect the House of Representatives, and the Senate would be elected by the House with candidates that were submitted by the state legislatures. Furthermore, Congress could legislate in any matter that was important for the union, could act directly on this country's citizens rather than through the medium of the states, and they could veto state laws that were out of bounds. Madison felt that this would stabilize the licentious states who were so out of control. He felt it also would give the people representation proportionate to their numbers, to their strength, and to their contribution to this country. For almost seven weeks, this plan was argued.

The New Jersey plan. The real press came from these small states who under the Congress, in the Articles of Confederation, and also at this Convention had one vote—tiny Delaware and Rhode Island, for example, had equal votes with the giants of Virginia, Pennsylvania, and Massachusetts. Giving up that kind of clout was something they determined not to do. It was strategically written into the Delaware delegates' instructions that they would never accept anything less than equal balance with a large state. It got testy. If you read Madison's notes, at one point Gunning Bedford just explodes: "The great states insist they will never injure the lesser states. I do not, Gentlemen, trust you."

In some cases, just sheer will was what drove the delegates of the small states against the reasoning of clearly proportional representation. They presented a New Jersey plan shaped very much like the Articles. It had one essential branch of Congress, and each state got one vote. Otherwise, this New Jersey plan was strongly national. It wanted many of the same powers, but it wanted each state individually to retain control the Congress. The states then were represented more so than the people.

The Connecticut Compromise. It took a final committee, a grand committee of reasonable men who came together and created the compromise that we know of as the bicameral Congress. The key figures were perhaps the Connecticut team of Oliver Ellsworth, William Samuel Johnson, and Roger Sherman, called by a fellow delegate "the oddest shaped character I ever remember...but no man has a better heart or clearer head." Since Sherman had the greatest number of children—fifteen—of the fifty-five delegates, I've always wondered if his very practical experience in balancing between large and small, between little and big, didn't help him see that there just had to be a reconciliation.

What the Great Compromise proposed was the Senate representing the states elected with the longitudinal term of six years and the more popularly representative House changing every two years, so as to better catch the pulse and the mood of the people. Randolph was so mad, at the large states' plan's loss in the Senate that he almost threatened to adjourn, but the small states called his bluff and threatened to adjourn, and go home, because they had what they wanted, and so there was nothing to do but give in.

On the 16th of July, the Connecticut Compromise passed. Half the Convention was completed, and a strong national government was assured. This government was assured. This government would consist of three branches, an executive, a judiciary, and a legislature. That their laws would be the "supreme law of the land" was proposed early in the Convention. With this supremacy accepted, a strong national government was clearly being constructed.

Regional Issues at Stake

Back in the Convention, there were more things that had to be solved, other issues that clearly would be sticky. Certainly some of them were the needs of each region. If you were from the North, you had to protect your

shipping, your interests, from the British, who were dumping their goods; you were a fledgling country with fledgling industries. You wanted the protection of tariffs. But the South wanted protection from the higher trade, the higher cost of goods. The South also wanted a guarantee that they could continue to import certain persons through 1808. The word *slave* is never mentioned in the Constitution, but the Deep South felt this need to generate the economic base of their labor force, so it was a part of the sectional bargaining that was included in spite of the frustrations of leaders like Franklin, Gouverneur Morris, and Mason, the Virginian who spoke most eloquently against the slavery issue. The balancing of the proportional representation included the three-fifths clause, that three-fifths of persons would be counted for representation in Congress as the South demanded, as the South wanted, but they would also be taxed. This kind of compromising at the Convention was uncomfortable but was done because the overriding goal, remember, was to bring thirteen autonomous states together under one acceptable union. The goal meant accommodating some of the sectional economic needs, which would culminate in conflict by the next century but which were necessary in 1787 in order to allow a constitution to be drafted that could stand a chance of acceptance by the states.

The Balance of Powers

The intricate balancing of powers was debated. The balances that were decided were mentioned in Thomas Pangle's description. Certainly there was the balance between two houses of Congress, and there was also balancing and separation between the powers of the president and the Congress. By the end of the Convention, with small states having great power in Congress, delegates were unwilling to let the Senate have quite so much power, and some issues were assigned to the president, such as appointment of Supreme Court justices, ambassadors, and making treaties, all with advice and consent of two-thirds of the Senate. These were done at the last minute as a part of the intricate balancing with a check given to the Congress.

All legislation stems from Congress, but only the House of Representatives initiates bills to appropriate the tax payers' money. Although the president can veto legislative actions, congress can override the veto with a two-thirds vote in both houses of Congress. If the president ignores the checks instituted against him, Congress can vote to expel him from office through the impeachment process. Congress also has the power (although it has never used it) to reorganize the Supreme Court if the judiciary oversteps its constitutional limits. Conversely, the Supreme Court traditionally has had the power of "judicial review" —in other words, it reviews the laws passed by Congress and signed by the president and decides whether or not they are legal under the Constitution. The Court, however, may review the appeals process of the lower courts.

Creation of the Constitution

The First Draft

During a recess, the Committee of Detail wrote the first draft to the Constitution. It was eleven pages. The first one began "We, the People of the States of New Hampshire, Massachusetts, Rhode Island, and Providence Plantations ..."—each state was carefully listed. There were twenty-three articles, most of which had been decided by the Convention by the time August began, but because lawyer James Wilson had the chance to do this manuscript drafting, he was able to insert the things he cared deeply about. He enumerated the powers of Congress and he allowed it to make all laws "necessary and proper" to carry out the foregoing powers. He tripled the powers of the judiciary, and he changed, in one phrase, the words "executive magistracy," scratching them out and putting in "president." He had to find the right words for just what he was writing, so the first draft of the Constitution could be ready to be evaluated, article by article, in the final month of the Convention.

The Last Draft

The last draft took place at the hands primarily of Gouverneur Morris in a Committee of Style and Arrangement. It achieved the narrowing down, the tightness from twenty-three articles to seven, to four pages only, to words that could expand and adapt to the centuries. It allowed "We the People of the States" to disappear and "We the People of the United States" to open the Preamble.

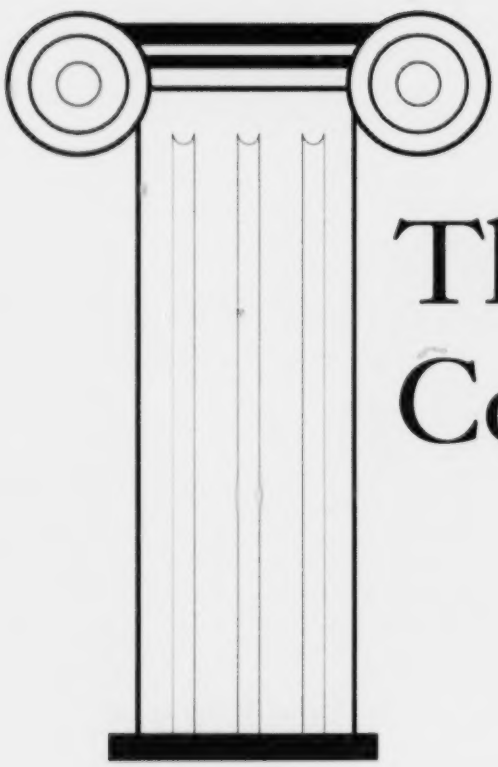
The Signing

On the final day, at the signing, there was an eloquent speech by the granddaddy of them all. At 81, Franklin was carried on a litter into the Convention. This day his speech was read by his friend James Wilson. He urged every person to remember his own fallibility. No one got everything that he wanted, every issue was argued, everyone had things that they still wanted to insert, but he urged the delegates to trust that they were fallible and that this was the best product they could have possibly presented, and to sign it and make it unanimous with all its faults because "I expect no better, and I am not sure it is not best." Then they were to return to their states to the people to urge their ratification.

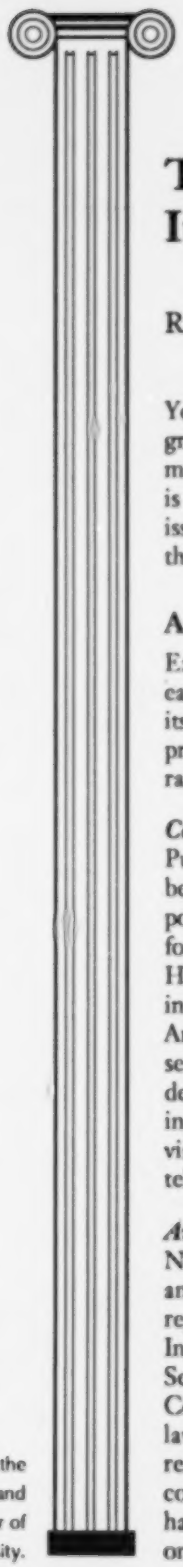
Conclusion: What the Drafters Had Achieved

Clearly, America had stood on the shoulders of its philosophers. The delegates had used their experience in

the state constitution, they had dealt with the practicalities around them, and yet they had contributed enormously to American constitutionalism. We had a new form of government. We had a constitution that was written and could not be changed, as could be done by the British by the legislature itself. We had the device of a constitution that could create and could amend. We had a practice of judicial review in place. We had a ratification process that went not to the state legislatures—where just think what would have happened—but went directly to the uniquely created ratifying conventions of the people and, emanating from them, the Constitution gained a validity and strength it would not have otherwise had. Finally, we had in place the dual system of federalism that is unprecedented in the world. The drafting of the federal Constitution was a powerfully inventive time, standing on shoulders, using experience, using practicality and coming out with a phenomenally new product.



The Congress



The Senate the Framers Created and Its Legacy Today

Richard Baker

You know in thinking about the Congress of the United States we confront a great irony. It is the most open of the three branches of our national government, and yet it is the most widely misunderstood among them. Whenever it is called upon to exercise its functions under the Constitution on controversial issues of great national concern, more often than not Congress is portrayed as the usurper, the interloper, the troublemaker.

Ambivalence of the American Public

Examples of intense public criticism in very recent times within the Senate are easy to come by. Recall the tirades from some quarters against the Senate for its conduct of Harry Claiborne's 1986 impeachment trial, its 1987 confirmation proceedings for Robert Bork's Supreme Court nomination, and its 1988 ratification review of the INF treaty—just three examples at random.

Confusion over Roles of the Two Houses

Public misunderstanding is particularly evident when it comes to distinguishing between the respective roles and procedures of the House and the Senate, and a point I guess I would make at the very beginning is that these are such profoundly different institutions. After spending nearly twenty years on Capitol Hill, I can no longer refer to Congress in the singular. It is two separate institutions that happen to come together from time to time. Now some Americans routinely refer to members of Congress, regardless of chamber, as senators. This practice did not go unnoticed by the *actual* senators who in 1986 decided that the time had come to permit televising of Senate floor proceedings. Their decision was due in part to a perception that they were the less visible to their constituents than the "senator" who was regularly seen in the televised House chamber proceedings.

Awe, Pride, and Contempt

Now Americans have traditionally viewed the United States Congress—House and Senate both—with a mixture of awe, pride, and contempt. It is easy to regard with awe a two-century-old institution that one only dimly understands. In 1805, Vice President Aaron Burr rendered a classic expression of awe for the Senate at the conclusion of the impeachment trial that acquitted Supreme Court Justice Samuel Chase. "This house," he said, "is a sanctuary, a citadel of law, of order, and of liberty. And it is here, it is here in this exalted refuge that resistance will be made to the storms of political phrensy and the silent arts of corruption. If the Constitution be destined ever to perish by the sacrilegious hands of the demagogue or the usurper, its expiring agonies will be witnessed on this floor."

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Related to awe is the idea of pride. And an expression of pride in its congressional context is generally associated with a constituent's view of his or her representative or senator. How else does one explain the current 96 percent reelection rate for incumbent members of the House of Representatives or the first-name familiarity with which total strangers warmly address their men and women in Congress—this is my man, this is my woman in Washington. We love them, and we always send them back.

Now feelings of contempt balance those of pride—"I love my congressman, but I despise the institution in which he works." Of course, a lot of people don't think often about Congress—except when they come to grips with some of its products like the Tax Reform Act of 1986. But there are times when they do, and when they do, often the feeling is of contempt. As long as there has been a Congress, candidates for office have attacked the institution and pledged to clean up the mess in the capital. Popular perceptions of inefficiency and downright stupidity are confirmed by the members themselves. A current senator who plans to retire at the end of this year recently wrote, "I have lived through five years of bickering and protracted paralysis. Five years is enough. I just can't face another six years of frustrating gridlock." Those feelings of contempt manifest themselves most strongly when the subject of a congressional pay raise is broached. The framers of the Constitution, in their infinite wisdom, felt inadequate to deal with this issue and left it to the members of the First Congress to try to sort out. Last week, the chairman of the House Ways and Means Committee, only partly in jest, suggested a do-it-yourself sliding pay scale, which would allow a member to choose a salary within a predetermined range depending on the member's effectiveness and seniority and on what the voters in his state or district might be willing to tolerate.

What We Need to Understand the Congress

On the eve of Congress's two-hundredth anniversary, we have a rare and genuine opportunity to deepen the public's understanding of its national legislature, to temper and redirect those feelings of awe, pride, and contempt.

Let me tick off a few things that were not available at the start of the planning for the congressional bicentennial. There was no singular popularly available written history of Congress; no up-to-date biographical directory of its 11,000 current and former members; no single bibliography of books and articles about either house or its members; no documentary film suitable for classroom use; no directory of locations of members' papers to guide researchers to these widely scattered but essential primary sources; no guide to the official records of Congress housed at the National Archives; and no encyclopedic quick reference source suitable for public library use. No wonder that studies of the national government are moving overwhelmingly by in the direction of the presidency, when you can go to nice comfortable presidential libraries and do all your research on how public policy was formulated, at least from that particular president's perspective. Now each house through its respective bicentennial commission, composed of key leaders in the House and the Senate, is well on its way to arranging for a significant production in each of the categories that I mentioned. To establish some frame of reference for later discussion, let's take a brief look at the development, under the Constitution, of just one House of Congress. Specifically, I should like to make some observations about the Senate the framers created, the Senate that they thought they created, followed by a backward glance at those elements in the modern Senate that they would recognize two centuries later as well as at those elements in the Senate that would surely astonish them.

Creation of the Senate

The Senate was created under the Constitution of 1787 to solve a major crisis in the distribution and control of power within the United States government. At the time the United States won its independence from Great Britain in 1783, its weak central government was in clear danger of collapse. It lacked the power to levy taxes, to raise an army, and to regulate foreign relations. Both Great Britain and Spain watched with interest as the thirteen states, no longer unified by a common enemy, quarreled amongst each other. Soon they would be ripe for annexation by foreign powers and the new nation would be doomed.

Having just fought a bloody war of independence against a harsh and repressive central government, the nation's political leaders were extremely reluctant to substitute another strong central government. Yet they realized that the country's very survival was at stake. Consequently, the existing Congress under the Articles of Confederation (a Congress that, of course, consisted of only one chamber with members who served only one-year terms and who could serve no more than three years out of every six) reluctantly agreed to call a special convention to restructure the national government.

When the delegates to the Constitutional Convention assembled in Philadelphia in May of 1787, they readily agreed on the necessity of a balanced central government with independent executive, judicial, and legislative branches. Drawing on the model of most existing state legislatures, they also agreed on a legislative branch that would be composed of two chambers—a House of Representatives and a Senate. There was never any doubt about that. The House would be popularly elected.

Term of Office

To guarantee the Senate's independence of short-term public pressure, as well as of domination by both the House and the president, the framers of the Constitution provided for state legislative election of senators and six-year terms of office, three times the length of House terms. You have to consider that when members of the existing Congress who served only one-year terms went along with an agreement to set up a legislative body with six-year terms, it was really a tremendous act of faith and hope. To counter the arguments of those who feared that a Senate whose members had lengthy terms would become an unreachable den of conspiracy, the framers determined that one-third of the terms would expire every two years. In this way, they brilliantly combined the principles of continuity and rotation in office.

Principle of Representation

The framers paid close attention to the Senate's role in balancing the interests of both large and small states. Small-state delegates went to the Constitutional Convention determined not to yield the advantage that they had enjoyed under the existing, but basically paralyzed government, where each state regardless of its size had only one vote in Congress. The ten smaller states were particularly fearful that the three larger states would combine and conspire for commercial advantage. The framers decided that the states would be represented in the House according to the size of their populations, while in the Senate they would be represented equally. And last year the Congress celebrated that great compromise by, for the first time in its history, leaving the seat of government and coming back up to Philadelphia for a great party and celebration. Each state under the framers' plan would be allotted two senators, as three would be too costly and would work against the desired efficiency of a smaller body.

Approval of Treaties

The Senate was given exclusive power to approve treaties with foreign nations but only upon the vote of two-thirds of its members. This important safeguard would make it possible for one-third of the states, or one-third of the members to block treaties objectionable to a significant minority. With a two-thirds vote, nobody expected very many treaties would be agreed to—and that was just fine with the framers of the Constitution. As best we can determine, the framers intended that the Senate would not be simply another council of states, as was the existing Congress (or a reactive executive council as existed in some of the states and after which to some extent the Senate was patterned) but rather it would be an independent body beholden to no single source of influence or pressure—again, I think, a major contribution of the framers. To ensure that senators would be more than the instructed messengers of state legislatures—and you can be sure that framers of the Constitution were telling state legislatures that indeed the senators could be instructed messengers—they as well as House members would be paid by the central government and they could not be removed from office by action of their states. And again, this was different from the situation under the Articles. Thus, with a six-year term, senators were offered a degree of independence greater than that of any other elected national office holder.

Confirmation of Appointments

The Senate was also given power to confirm or reject the president's choice of cabinet officers and other key administration officials, as well as nominees to federal judicial posts. As legislators with statewide constituencies, at a time when communications around the nations were primitive, senators were expected to know better than anyone else within their states who would be the most suitable candidates for major posts. In fact, an earlier version of the draft of the Constitution had the senators actually appointing these individuals. The Constitution accorded the Senate the power to sit as a court of impeachment with the final authority to remove a president, judges, or federal officials guilty of high crimes and misdemeanors. And in 1986 we were still debating what we mean by "high crimes and misdemeanors"—strange, strange term.

Attendance and Elections

The framers of the Constitution feared that difficult travel conditions of the late eighteenth century might keep members away from their duties in Congress, the distressingly common occurrence in the then-existing Confederation Congress. Accordingly, the framers provided each house with the power to compel attendance and to control elections of members so that the states could not kill the national government by failing to hold elections. That power to compel attendance reached the national headlines recently as we saw Senator Packwood being dragged into the Senate chamber—not really kicking and screaming but actually limp, but a senator being physically carried for the first time in the Senate's history.

The Senate That Was Created in 1787

Well, with this the framers completed their work. During the campaign for the Constitution's ratification, which happily culminated two centuries ago today, its provisions for a Senate received careful attention through the thirteen states. Supporters characterized the Senate as "a bulwark against tyranny"—a source of stability and legislative wisdom and the states' ultimate guarantee of sovereignty. Critics, on the other hand, continued to express fears that the Senate might evolve into a dangerous aristocracy with its longer terms, broader powers, and smaller numbers.

Legacy in 1988: What the Framers Would Recognize

Now, let us return to the Senate of 1988. If we could summon back the framers of the Constitution to review their handiwork, what of the Senate would they recognize?

Passion for Deliberation

They certainly would recognize its passion for deliberation. As any viewer of the C-Span II television network can attest, the Senate continues to display its traditional style of extended deliberation. Senate rules and precedents guarantee maximum latitude to each senator to present his or her views as fully as humanly possible.

This is the Senate's most fundamental difference from the House, I would argue. In the earliest years, the Senate's rules, following English parliamentary practice, provided for the cutting off of debate on so-called delicate subjects or on those that might provoke injurious consequences. Yet no one could quite determine how to define "delicate" or "injurious." So the rule was abandoned by 1806. And it was not until 1917 under the stimulus of wartime emergency, that the Senate finally adopted a rule that would cut off debate, the so-called cloture rule for limiting filibusters. And that rule was invoked on only five occasions between 1917 and 1962. Now, today, use of this provision for ending debate has become more common, but it remains by design very difficult to apply. So the framers would certainly recognize the passion for deliberation.

Looseness and Informality

The framers would also recognize the Senate's untidiness, which is why the senator I quoted earlier threw up his hands in disgust and said, "This is no fit body for any human being and I'm leaving." The framers assumed that the Senate would operate as a grand committee. The Senate of the First Congress had only twenty-six members, and generally fewer than twenty were present at any given time. This promoted an informality that made it unnecessary to devise precise rules or rigidly to apply them. Senators would informally discuss the need for specific legislation or the reaction to a measure sent from the House or from the president. And only when they reached a general consensus about that measure would they create a temporary committee to draft the technical language and resolve pending questions, and then the committee would be abandoned or disestablished. This informality led to a degree of untidiness that continues to characterize the Senate's proceedings.

Collegiality and Civility

The framers would recognize the spirit of collegiality. Although the Senate has grown from twenty-six to one hundred members, it remains relatively easy for members to get to know each of their colleagues. Compare this with the House of Representatives, where today most members are acquainted, surprisingly enough or maybe not surprisingly, with fewer than half of their colleagues, in terms of who they are and what makes them tick. In the Senate, it's easy for a member to pretty much know what will drive or motivate any one of his or her ninety-nine colleagues.

On occasions, in the Senate, tempers may flare, but rules and traditions promote civility in all matters. Today, we can count on one hand the number of open breaches of civility during two centuries, events such as the 1856 caning of a Massachusetts senator by a South Carolina House member or the 1902 fist fight between two senators from South Carolina, or an altercation between a senator from Texas and a South Carolina senator in the 1960s when there was a pushing and shoving match. But again the fact that we make a point of these incidents and remember them today suggests how extraordinary and unusual they are—and under the rules of the Senate a senator at any time can be forced to take his or her seat until the matter has been determined.

Caution and Concern for Continuity

Another quality the framers would recognize and perhaps recommend is institutional continuity and caution. The framers intended the Senate to be an essentially cautious body. Unlike the House, which goes out of existence at the end of each two-year session of Congress, the Senate is, of course, a continuing body whose current members are as links in a chain extending back to the first Senate of 1789. No more than one-third of its members' terms expire at each election. Departure from custom is viewed cautiously, and change comes, as intended, with great agony and deliberation. Throughout its nearly two centuries, the Senate has jealously guarded its independence from the House and from the executive and judicial branches.

In 1805, just to cite one of many examples, the Senate resisted pressure to follow the action of the Republican-controlled House, which had just voted to impeach Federalist Supreme Court Justice Samuel Chase. His high crime or perhaps his misdemeanor, in the eyes of the Jeffersonian Republicans, was his Federalist party affiliation. After the Senate acquitted Chase by a four-vote margin, Senator John Quincy Adams observed that the impeachment trial, just concluded, "exhibited the Senate of the United States fulfilling the most important purpose of its institution by putting a check upon the impetuous violence of the House of Representatives"—that observation, of course, coming from a senator. Adams continued, "It has proved that a sense of justice is yet strong enough to overpower the furies of faction; but it has, at the same time, shown the wisdom and necessity of that provision of the Constitution which requires the concurrence of two-thirds for conviction upon impeachments." Sixty-three years later, the Senate showed similar bipartisan and

unilateral independence in acquitting impeached President Andrew Johnson by a single vote.

The Senate has also been cautious in the exercise of its constitutional powers to discipline incumbent members. Whenever possible, the Senate has preferred—although one can say it is out of cowardice or political expediency—to leave the judgment against members to be disciplined up to the voters. Only eight times in its entire history has the Senate resorted to the harsh sanction of formal censure of errant members. It has not expelled a member since the Civil War, although the threat of impending expulsion has hastened the resignation of several senators.

What Would Surprise or Mystify the Framers

Now we shall turn briefly to those features of the modern Senate that surely would surprise or mystify the framers of the Constitution and the Senate's early members. No eighteenth century American could possibly have grasped the challenges posed by the nuclear age in which we live, and that leads me to my first point—staff and institutional resources.

Staff and Institutional Resources

The institutional resources available to modern senators would be incomprehensible to the framers. And they're incomprehensible to many voters and many members of foreign parliaments who visit the Congress. Most of the framers witnessed the government's move from New York City to Philadelphia in 1790. Many were also living in 1800 when the government took up residence at its permanent seat along the swampy banks of the Potomac River. At each location the Senate occupied a modest chamber. Members seeking office space worked either at their desks in the chamber or in their cramped lodgings nearby. If they needed clerical assistance they used personal funds to hire temporary employees. This situation continued until about the mid-1850s. The addition of new states to the Union during the second quarter of the nineteenth century significantly increased the Senate's membership.

When the Constitution's chief framer, James Madison, died in 1836 the Senate had 50 members. Within fourteen years that number had jumped to 62. That's to say nothing of the explosion that was going on in the House side, where they went from 59 to 65 to 109 to 213 all within several decades. Consequently, wings were added to the north and south ends of the Capitol. In 1859, the Senate occupied its spacious new chamber, where it has remained to this day. At that time the Senate agreed to hire a permanent staff for several of its major committees, usually those committees that had to do with finance. In the 1880s, the Senate took a further step by authorizing funds for each senator to hire a personal clerk at government expense.

By the start of the twentieth century, the emergence of the United States as a world power was mirrored in the growth of congressional staff and office space. The first permanent Senate office building opened in 1909. By the end of World War II, a second building was under construction, and in 1947 Congress for the first time provided funding to hire professional staff of a caliber equivalent to that available to the executive branch—a standard that was very important to them. No longer did Congress have to rely on the executive branch, or other interested parties, lobbyists, interest groups, or whatever, to draft complex legislation.

Today, the Senate employs approximately seven thousand professional, clerical, and other support personnel. The House of Representatives, not to be outdone, accounts for 12,000 staff members. But should this stagger you, consider that the executive branch of the government has more than three million civilian employees.

The Political Party Structure

Also surprising to the framers would be the political party structure. As we know, the framers never anticipated the development of legislative political parties. Yet almost from the Senate's very first days, members have conducted their work within a party framework. In the 1840s, political parties took on an important organizational role when the Senate agreed to appoint its committee members based on recommendations by party caucuses. That gave parties tremendous power if they could determine who would be on which committee and who would be a chairman of that committee. This new method of selection greatly enhanced the influence of parties in the Senate, to be sure. It was not until the 1920s, however, that Senate party caucuses specifically designated majority and minority floor leaders. Today, these majority and minority leaders, particularly the majority leader, exercise enormous legislative and administrative power that would be incomprehensible to the framers.

Public Character of Senate Deliberations

As for public sessions, the framers simply assumed that the Senate would follow their practice of meeting behind closed doors. They believed that the publication of an official journal with information on how members voted on legislative matters would be sufficient to keep the public informed. However, opposition to this closed-door policy emerged during the first session of the first Senate and grew in intensity during the next five years. State legislatures, not surprisingly, complained that they could not effectively assess the performance of the senators that they had elected if they were meeting behind closed doors. Press coverage of House sessions, which were open to the public, began to popularize that body's role, and soon the public started to use the words

House and *Congress* interchangeably. The Senate was becoming the forgotten body. Finally, in 1794, the Senate agreed to allow spectators for all business except that dealing with treaties and nominations. And it was only in 1929, after repeated leaks to the press about the activities of these closed executive sessions, that the Senate finally agreed to open all of its proceedings, except in rare instances involving national security information. Some people jokingly thought that the Senate continued to meet behind closed doors up until 1929, just to keep the press interest up in what was going on behind those doors. When the press stopped paying attention, they decided they might as well open the doors. In 1986, the Senate took the final step toward providing full access to its proceedings by initiating live radio and television coverage.

Standing Committees

Another surprise to the framers would be the standing committees—the permanent committees. As I suggested before, the framers expected the Senate to form committees as needed to conduct special inquiries on technical matters. When a committee had served the purpose for which it was created, it would go out of existence, and in fact this is how the Senate operated for the first quarter of a century of its existence. The War of 1812, however, demonstrated the need for consistent availability of expertise based on what might come from permanent standing committees. In 1816, right after the war, the Senate began the practice of creating subject-oriented committees to examine corresponding sections of the president's annual message. Until the twentieth century, a committee chairmanship provided, and this was a fatal mistake—office space and modest staff resources to those who were chairmen. Accordingly, the Senate came under great pressure from its members to create many committees, and many of them were of questionable purpose to be sure, simply to provide staff and office space. The Committee on Revolutionary War Claims was going strong until 1921, when the Senate abolished it and forty other useless committees. Following World War II, with the availability of additional staff and office space for all members, the Senate again reduced the number of its committees, from thirty-three to fifteen. Comparable changes were going on in the House side as well.

Over the past forty years, the number of committees has remained fairly constant, but when you look further, you will realize that there has been a rapid growth in the number of subcommittees. There are currently on the Senate side about 100 subcommittees and on the House side about 125, so you if you add all those up you get a pretty big number. In 1974, to compound the matter further, the Senate greatly expanded committee and subcommittee staffs, creating separate minority party staffs and allowing every committee member to have a personal representative on the staff of each committee to which he or she was assigned. On the positive side, this has guaranteed an open legislative system with multiple points of entry for those seeking to influence public policy, but frankly, and less positively, it has also produced a great deal of fragmentation and duplicated effort, so the senator that I quoted in the beginning did have a point.

Direct Popular Election

Finally, as for direct popular election, the people of the United States during the two past two centuries have made only one significant alteration in the framers' handiwork when it comes to the Senate. The Seventeenth Amendment to the Constitution, ratified in 1913 as we know, provides for direct popular election of senators. This change came as a result of a continuing series of deadlocks between the two houses within many state legislatures. The framers did not specify how the legislatures were to resolve these deadlocks. When you had an assembly of one party and a lower house of the other party, who's to say who's going to be the senator? In 1895, for example, the Delaware legislature took 217 ballots over a period of 114 days and still failed to elect a senator. Delaware and other states often went without full representation in the Senate for extended periods of time.

Effect of Changes Affecting Senate Operations

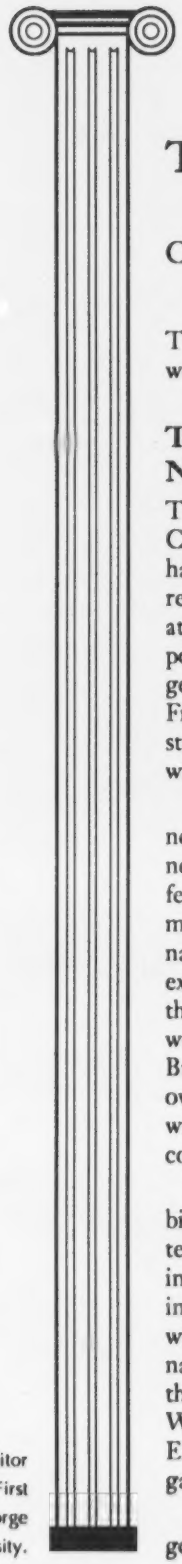
Well, if time permitted, I would discuss other major changes of the past two centuries that have had a major impact on Senate operations, and we could give the same speech for the House side as well. Certainly, the framers never anticipated that the Senate would be meeting on a virtual year-round basis or that cable satellite communications and jet travel would bring its members into virtually instantaneous communication with their constituents. And they would be dumbfounded at the cost of senatorial election campaigns, which can run, in this day and age, anywhere from $3 million to $15 billion, depending on a state's size and its media markets. I believe that the current situation in campaign finance, with its favoring of incumbents and also those with access to large amounts of wealth, poses the greatest single threat to the continued vitality of our Congress under the Constitution.

Conclusion: Our Most Recognizable Federal Institution

In conclusion, I wish to suggest that the United States Senate is the one institution within the federal government that the framers of the Constitution, after two centuries, would be able to recognize. They would understand its passion for deliberation, its untidiness, its aloofness from the House of Representatives, and its

healthy suspicion of the presidency. They would probably not comprehend the role of legislative political parties.

They would wonder why Senate proceedings had been opened to the public. The framers would certainly marvel at the Senate's three large office buildings, and the seven thousand staff members who fill them, and yet they would understand the Senate's capacity for meeting the changing circumstances inherent in the nation's twentieth-century rise to world-power status. They would sympathize with continuing calls for reform of Senate procedures, just as they would acknowledge the force of precedent and tradition that make those changes so difficult to accomplish. Above all, they would be delighted, I am sure, that the Senate, and the Constitution that created it, had endured for two centuries.



The First Federal Congress

Charlene N. Bickford

The primary question facing those delegates in Philadelphia in 1787 was, are we to be a nation or continue as a loose confederacy?

The State of the Nation and the New Constitution in 1789

Throughout the 1780s, evidence that a governing compact, the Articles of Confederation, was not sufficiently strong to meet the needs of the new nation had accumulated. The only source of funds available to the government—requisitions on the states—was unreliable since the states might pay late or not at all. Each state had a different monetary system, and Congress lacked the power to regulate interstate trade. Settlers on the frontiers, frustrated by the government's inability to help and protect them, threatened to turn to Spain or France for assistance. The lack of a military force, and dependence on local state militias for defense, left the new nation unable to cope with hostilities within its own borders and vulnerable to foreign attacks.

Nationalists, such as Alexander Hamilton and Robert Morris, had engineered the calling of the Federal Convention and were determined to create a new form of government. Conversely, many leaders and ordinary citizens feared a strong central government. Experience with rule by a European monarchy had caused them to be suspicious of any attempts to strengthen the nation's government and particularly the nationalists' plans for a strong executive. Standing armies were also viewed as a threat to liberty, another fear that had its origins in the European experience. Thus, the Federal Convention was called to revise the Articles of Confederation rather than to replace them. But as we all know, the nationalists quickly seized the day and established their own agenda through the introduction of the Randolph plan, which was actually written by James Madison, and thus we had a completely new government contract at the end of that convention.

The Federal Convention has been the focus of attention during the 1987 bicentenninal celebration of the United States Constitution. There has been a tendency to credit the members of that body with performing a divinely inspired miracle. It's very important to stress to all of you that the participants in the framing of the United States Constitution were human beings, grappling with problems similar to those faced by the United States today—substantial national debt, sectionalism, an unfavorable balance of trade, questions about the balance of power between the states and the national government, etc. While these men read widely and were well acquainted with the theories of European Enlightenment philosophers, they also had the practical knowledge gained from the colonial, Revolutionary, and Confederation experiences.

At the Convention they created a form of government that resembled other governments, particularly those of the states in some ways, but that was also

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unique in many aspects. The miracle came about as a result of hard-nosed political bargaining and compromise. It is clear that the majority of delegates, although they were not totally satisfied with the final document, saw it as the product of the balancing of diverse interests represented.

When the First Federal Congress convened in New York in March of 1789, the success of the experiment represented by the new federal Constitution was very much in doubt. The United States had a population of four million, and its area was larger than any European state except Russia. There was no example in history and no support in traditional political theory to encourage those who would attempt to govern such a nation by a republican form of government based on the consent of the governed. Many nationalist supporters of the Constitution, as well as its critics, doubted that the plan of government would work in practice unless changes were made, either formally by amendments or informally by interpretation, to bring the new Constitution closer to their sometimes conflicting standards of perfection. Yet our American experiment did succeed. For two centuries this has astonished skeptics. "God," a familiar epigram observes, "looks after fools, drunkards, and the United States of America." Remarkably, the United States Constitution has not only operated to provide a greater degree of liberty, justice, and prosperity to its citizens but has also shown such impressive stability that it is now the oldest written constitution in operation in any modern state.

How can we account for this success? Much of the credit belongs to the genius of the founders and framers of the Constitution, their historical and intuitive knowledge of man and politics. Yet this does not provide a full explanation. Many nations have come to ruin under constitutions deliberately patterned after the American model. It was the way in which the American people implemented their Constitution that made a functioning out of the document's abstractions. Nothing was more essential to the enduring success of that system than the First Federal Congress. It's that institution that I'd like to talk about today.

The Members of the First Federal Congress

Over the past two centuries a two-party system has evolved and become a given in any analysis of how Congress accomplishes its business. But students of the Congress of 1789 do not have these neat labels to categorize the members. The only available litmus test is the question of support for, or opposition to, the ratification of the Constitution. Only six individuals who could be classified as Antifederalists served in the Congress at any one time. There were some indications of the first awakenings of what would later be termed the Jeffersonian Republican party, but the divisions in the First Federal Congress were based more on sectional interests than on political philosophies, and if one wishes to use labels reflecting philosophies, the terms *centralists* and *decentralists* describe the factions better than *Federalists* and *Antifederalists*, and they cover those individuals who supported ratification but opposed concentrating even more power at the national level.

The Federalists had the votes to implement the policies that established a strong federal judiciary, funded the national and state debts, set up a revenue collection system, and so on. But because of the strong influence of state and regional as well as economic interests upon the decision-making process, many of the votes were much closer than the loose party labels of the time would have indicated. Keeping in mind the regional differences and interpretive challenges facing the new legislative body, picture the members of the First Federal Congress arriving on horseback by the Boston Post Road or by ferry from New Jersey and New York City, which in 1789 extended as far north as the Bowery, to begin the challenging task of implementing the United States Constitution.

Early Precedents

After more than a month of uneasiness over the lack of a quorum to proceed upon the important business facing them, on April 6 the Congress finally proceeded to count the electoral votes for president and vice president. Both houses of Congress accomplished the necessary procedural business to set the government in motion with dispatch, but the issue of possible titles for the president and vice president delayed the start of legislative business. No constitutional provision was made for such titles, but John Adams, who immediately assumed an activist role upon being sworn in as president of the Senate, fervently supported these titles. The majority of the Senate espoused a more glorious title for the president, such as "His Highness, the President of the United States of America and Protector of Their Liberties," but the House opposed any titles. Finally, the Senate capitulated and agreed to the unembellished "President of the United States."

The decision against titles was a real, if somewhat symbolic, step toward the complete break with monarchical traditions—a process that was begun in 1776. The power of the president was not diminished, however, and throughout the century of our federal government, the president's authority has been continuously augmented through legislation, constitutional interpretation, and interhouse usage. In addition, the conclusion of this first interhouse struggle was a victory for the House during a period when the relative positions of the two houses were taking shape.

The Legislative Agenda

With procedural decisions out of the way, both houses began to work on the pressing legislative agenda. The House of Representatives took up issues relating to obtaining the revenue necessary to operate the government and to establishing executive departments.

Debate over Presidential Authority to Remove Executive Officers

During the House consideration of the legislation establishing the Department of State, the most extensive First Congress debate centering on a constitutional question occurred. This debate concerned a presidential power that is taken for granted today—the authority to remove executive officers without approval from the legislative branch. Although the Constitution explicitly outlines the procedures for appointment of executive officers, it is silent on their removal. Four distinct constitutional interpretations emerged during the debate on this issue. Eventually, those who held that the power to remove executive officers is an implied power held by the president prevailed. Acts establishing the three executive departments all made no mention of removal.

Today, the president's control over executive branch appointees seems something that's assumed, but at that point in time that decision had a tremendous impact on the shape that our federal government would take in the future and tended to detach the executive and the legislative branches. The debate also must be seen as part of a Federalist campaign to build the authority of the executive branch during Washington's tenure in office. Political motives are always part of any legislative decision.

The Judiciary Act of 1789

While the House was occupied with the executive departments and the revenue bills, the Senate's intention was turned to the Judiciary Act, a legislation so fundamental to the history of the development of the judicial branch of our government that it has been more thoroughly studied than any other action of the First Congress, except perhaps the amendments to the Constitution later known as the Bill of Rights. The framers of the Constitution, seeing the issue as one that would threaten the consensus that was being molded at the convention, gave very little attention to the details of establishing the judicial branch of the government. The first sentence of Article III, section I simply states that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish." Thus, the Federal Convention, seeing the federal judiciary as a politically treacherous issue, compromised by postponing a decision. The legislature would decide nearly every jurisdictional, structural, and procedural question. There was considerable controversy during the ratification debates over this question, and expressions of fears that federal courts would usurp the judicial rights of the states were frequently heard. Additionally, many of the amendments to the Constitution proposed by the ratifying conventions sought to put limits on the judicial power and protect individual rights in federal courts.

The Judiciary Act of 1789 created a strong federal judiciary with a system of inferior courts appeals from those courts to the Supreme Court. This formative legislation fleshed out the third branch of the government and also established the principle of judicial review of the constitutionality of legislation, which has played such an important part in the evolution of our governmental system.

The First Twelve Amendments

A third extremely important constitutional issue resolved during the first session was a passage of the twelve proposed amendments to the United States Constitution. Several of the states attached amendments to their ratifying documents, and some Federalists, most notably James Madison, had promised amendments once the new government was in place. But the members of the First Congress were wary of any amendments that would modify the government structure or authority. It was only on Madison's insistence that the issue was taken up. Despite the efforts of some Antifederalists, the amendments concentrated almost exclusively on the protection of individual rights. True Antifederalists realized that with the amendments Congress had protected individual rights without reducing the power of the federal government in any significant way; they believed that they had been betrayed by the Federalists. Thus, the Bill of Rights, which has played such an important and significant role in the nation's constitutional history, was considered to be a relatively innocuous document that was important simply as a fulfillment of the political promise to consider amendments.

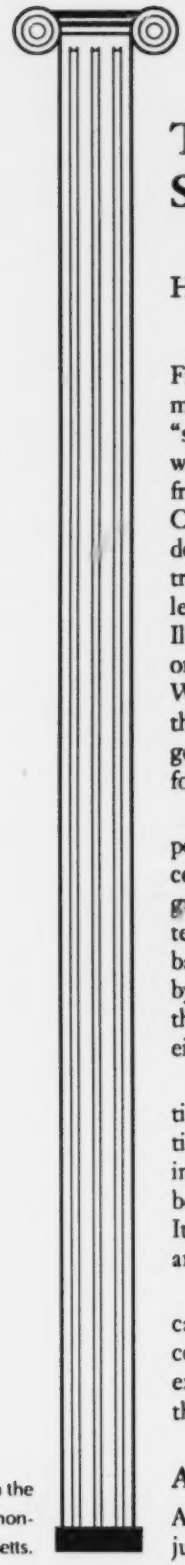
Resolution of Divisive Issues

It's fascinating to study the debates of the first session and the letters of members and realize that although the Congress had such important issues as the establishment of executive departments and the judiciary and amending the Constitution under consideration, the issue that was of overriding interest to the members was the location of the United States capital. This issue brought out all the sectional differences that existed in this Congress. The continuing struggle reached an impasse during the second session which was finally resolved by a bargain struck over the federal government's assumption of the Revolutionary War debts contracted by the individual states, the second-most divisive issue that the Congress faced. Maryland and Virginia representatives from the immediate area of a potential Potomac capital were persuaded to vote for the assumption of the debts, which benefited primarily the northeastern states and South Carolina, in return for a

promise that the necessary northern votes would be provided for a Potomac capital.

The members of the First Federal Congress were masters of the art of compromise, but the resolution of the seat of government and assumption issues was their finest achievement in overcoming the divisive effects of sectionalism and defusing what was a very serious threat to the new union.

The Constitution that was created by the men gathered in Philadelphia during that hot summer of 1787 still stands as a magnificent achievement. I've provided you with a short overview of how the First Federal Congress accomplished the business of fleshing out the structure created by the Federal Convention. That process continues today. Twenty-six amendments have been added, and the document has been interpreted and reinterpreted, but the government framework that was outlined has not been altered, at least not on paper. In reality, the flexibility of the new Constitution enabled the government to continually grow and take on new responsibilities.



The Confirmation Process and the Separation of Powers

Hon. Patti B. Saris

First, I want to give a little bit of background about my experience in government which helped me appreciate how "the checks and balances" and the "separation of powers" work as a practical matter. When I was 27 (in 1979), I was sitting in a law firm in Boston grinding away at a brief and a friend of mine from law school called me up and said, "Hey, Senator Kennedy just became Chairman of the Senate Judiciary Committee, how would you like to come down and interview to work on the Committee?" Well, it was a dream come true. I grew to love the United States Senate and became a part of the campus legislative. I worked there with great pride, so much so that when I heard that Illinois Congressman, soon-to-be Judge, Abner Mikva, was looking for someone to help write a book on the Congress, I jumped at the opportunity. From Washington after three and a half years, I moved home to Boston to work at the U.S. Attorney's Office and became chief of the civil division. There I saw government from a different perspective. In the Senate, I saw the difficulty of forging a consensus necessary to pass legislation.

Now, I'm a United States Magistrate and I see the world from the judiciary's point of view. Let me explain briefly what this is. I'm in one of those "inferior" courts that the previous speaker, Charlene Bickford, was referring to. Congress set us up, about twenty years ago, and greatly expanded our powers about ten years ago. I'm a statutory judge set up by Congress to deal with the federal backlog. Basically, I'm the lowest rung of the federal system. I was not named by the president or confirmed by the Senate. I was voted on by a majority of the federal district judges in the federal district of Massachusetts and serve an eight-year term.

You may ask how a magistrate who hasn't even gone through the confirmation process can talk about that process. I decided to talk about the confirmation process because, in my opinion, it reflects, in the most exciting way I can imagine, the tension between the three branches of government—the interplay between the executive branch, the judicial branch, and the legislative branch. It's also exciting, at this time, just as we've all watched the Bork nomination and the process of getting a new Supreme Court justice.

Even though it has problems, Congress works well as an institution. Basically, it's successful at what it sets out to do. In my opinion, the process of not confirming Judge Bork, whatever you think about his qualifications, worked exactly the way that the Senate expected it to work when the framers formed the Constitution 200 years ago.

Articles II and III on the Nomination of Judges

Article II of the Constitution provides that the president shall nominate the judges of the Supreme Court with the "Advice and Consent" of the Senate.

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That was a compromise, like everything in that Constitution. Originally, under the Virginia Plan, the Senate was supposed to nominate the judges. To us that sounds like a radical idea but when you understand the backdrop of what was happening in all the state legislatures around the country, it isn't so surprising. In fact, after the American Revolution hatred for the royal government and the governors was such that in many legislatures, right before the Constitution passed, the judges were selected sometimes by the popular house of the state of assemblies, sometimes by the upper chamber, and often just for one-year terms. There was considerable fear that the judges would usurp the popular will. Judges were not empowered to declare any act of the popular assembly unconstitutional. So when the Virginia Plan came about, the question was whether or not the power to name the judges should rest with the Senate or with the president, and of course the compromise was forged.

When you look at the compromise, there's another interesting fact: Article III, as Charlene Bickford mentioned, only established the Supreme Court and it left it up to Congress to establish the inferior courts and Congress, of course, did just that. But the "Advise and Consent" power extends all the way from the Supreme Court down to the federal district courts.

I will briefly describe federal, state and judicial systems. Here is the Supreme Court, nine fine people sitting right there. There are two parallel court systems below the Supreme Court. Most people only deal with the state court system; they never see federal court. Divorce is handled by the state. Judge Wapner's court is the state. Perry Mason's court is the state. All the murders and rapes and divorce and the things that happen in most people's lives are handled by the state system. All appeals are handled by a state supreme court, and then a losing party can go up to the Supreme Court if there's a challenge.

So what are the federal courts? Federal courts have narrow jurisdiction. Below the Supreme Court you have eleven Courts of Appeals, and below them you have the federal district courts which are the trial courts. All the judges of the federal system except magistrates are named by the president and confirmed by the Senate.

Another interesting angle is to look at the Constitution as a whole. Right before it refers to the confirmation, it talks about treaties. It says two-thirds of the Senate must ratify a treaty. It does not say that about the confirmation power. Yet while two-thirds is not formally required to confirm a judge, Senate wisdom uses the two-thirds vote to insure against a filibuster. So, as a practical matter if a judicial nomination is controversial, you have to count on obtaining support from two-thirds of the senators. As a constitutional matter, it's an interesting distinction that the Senate was given less power in the confirmation process than in the ratification process.

The Process for the Lower Courts

The confirmation process for judges nominated to the lower courts differs dramatically from the process for the Supreme Court. When I worked on the Senate Judiciary Committee, I could see there was generally not as vigorous a check, on the district court nominees as on the Supreme Court nominees. Basically, what usually happens for the lower courts is that people apply. The attorney general evaluates the nomination substantively and politically, as does a special committee of the American Bar Association. According to a courtesy in the "gentlemen's club," as the Senate is still known, if a senator doesn't like the nominee from the home state, he uses a "blue slip."

Under Senator Kennedy, when he became chairman of the Judiciary Committee in about 1979, a senator no longer possessed an absolute veto over a judicial nominee. But an objection from a home-state senator basically means the nomination becomes controversial, so it's sure better to have your senator on your side. When the home-state senators and the president are from the same party, there rarely is a conflict because the president's staff does its homework before a nomination is sent down to the Senate. So, in fact, the senator plays a huge role in deciding who the nominees are for the district court and the court of appeals. If they're from different parties, the local party of the president will play a large role in who is nominated.

It is, of course, critical to have a meritorious nomination, but even the most brilliant nominee needs political support. Most of the scrutiny of nomination goes on behind the scenes, and the hearings on nominations for the district courts and on the court of appeals are relatively perfunctory. I remember a particularly boring hearing where one senator asked several of the home-run kinds of questions, such as "Do you believe in the Constitution?" If nominees are basically competent, have personal integrity, pass an FBI check, and have the requisite political support, the judiciary committee will generally report them out to the Senate which will then confirm without much ado.

The Senate's Historical Concern Over Supreme Court Nominations

I want to stress that the process for confirming Supreme Court nominees is very different. Under the Constitution, the process is actually the same except the Senate has historically taken Supreme Court nominations extremely seriously. The statistics on this subject were actually a surprise to me. I found that more than a fifth of the president's nominees to the Supreme Court have been rejected. When the press was playing on the Bork nomination, it made it seem as if some sort of aberration was happening. Well, that's not accurate at all. It was

during the eighteenth and nineteenth centuries that most of the rejections occurred. Overall, 28 out of 142 Supreme Court nominees have been rejected. Twenty-two of those 27 were in the eighteenth and nineteenth centuries, but from President Hoover to President Lyndon Baines Johnson, the Senate confirmed 24 consecutive nominations with no more than 17 negative votes against any one nominee.

It wasn't until the Carswell, Haynsworth and Fortas fights that the Senate began to take a more aggressive role in the confirmation process. Now, what happened then? Why is it that in the eighteenth and nineteenth centuries there were so many rejections of nominees? In fact, one of President Washington's first nominations—back in 1795, I think—was rejected because he didn't support the Jay Treaty. There was a scrutiny of nominees that went beyond just determining whether they were fit for office. With great amusement, I saw that President Grant, by accident, named someone who supported the Confederacy. There was some debate over Justice Brandeis because he was viewed as that radical from Boston. I guess Boston had that reputation even back then.

But basically, after the beginning of the twentieth century there were very few serious disputes over nominees to the Supreme Court. One reason for this senatorial acquiescence was, perhaps, the rise of the "imperial presidency." President Franklin Delano Roosevelt, who was so criticized for his court-packing plan, got all his nominees through with no serious problems and little debate because of the great political consensus he had behind him as president and because the president's power was growing vis a vis the Congress.

It's ironic that the president who reinvigorated the Congress as an equal constitutional partner was President Nixon. Under his presidency, the Congress moved together to reassert some of its power because it was so concerned about what was happening in Vietnam and in Watergate. The Congress passed more health and safety legislation under President Nixon than at any time in its history. It passed a great deal of legislation over the president's power to declare war. To have more impact on the budget it put together better and larger staffs. Congress was taking back power and becoming again a coequal branch. One reflection of that was that the Senate was taking its role in confirmation very seriously.

How the Process Works

I want at this point to move to the actual process of confirming Supreme Court nominees. It used to be that Supreme Court nominees never even appeared in front of the Senate. Frankfurter, in 1939, was the first one who actually appeared to answer questions. This was the whole of his testimony: "I should think it improper for a nominee no less than a member of the Court to express his personal views on controversial political issues affecting the court." Justice Douglas never testified—he appeared but didn't answer any questions. As a matter of fact, when Justice Frankfurter was first invited to appear at his hearings, he initially declined on the ground that his workload of teaching was too heavy to afford him an opportunity to appear, and then apparently some friend got to him and persuaded him to appear.

In 1981, for the first time, with the nomination of Sandra Day O'Connor, the confirmation proceedings were shown on television. In fact, the impact of TV is yet to be seen. In an article that appeared recently in the *Harvard Law Review*, Nina Totenberg of National Public Radio pointed out that maybe if Bork looked a little more like Cary Grant, the confirmation process would have gone differently. In fact, TV was one important aid in marshalling public opinion.

One can see that there's been an increasing thrust toward asking nominees questions about what they believe in. That's because the Senate is quite concerned about the growing impact of the judiciary on issues like abortion, prayer, criminal rights, busing and discrimination in private clubs. The Supreme Court has an impact on every one of our lives and the Senate wants to know what the nominees' views are.

The Bork Nomination Controversy

Take the case of Robert Bork. On paper, no one was more qualified to hold the position of Supreme Court Justice than he was. He is a very well respected professor at Yale on antitrust. He was formerly Solicitor General of the Justice Department, and he was a judge of the D.C. Court of Appeals, which is a little more equal, they like to think, than the other courts of appeals around the country. So what was the problem? The ABA did a screening of Judge Bork. The ABA, in fact, as I mentioned earlier, does a screening of all judicial nominees, and they basically do a little vote on whether they think a candidate is qualified. Ten out of the fifteen gave him highest rating, "well qualified," but four out of fifteen said that they found him not qualified.

What was the concern? It's actually somewhat unusual to have a split like that in the ABA committee. The concern in the Senate was not a concern about competence or integrity, but whether he had enough respect for some of the fundamental rights at issue in our society such as the rights of women and the rights of minorities. Did he reflect on the American consensus on some of the big issues facing us?

There are a lot of concerns about what happened prior to the hearings on Bork. As for national political activities either on behalf of or against the judge, there were TV campaigns, seen all across the country, asking whether or

not after he became a judge, women would be going back to illegal abortions using coat hangers. What was going to happen with affirmative action? And on the other hand, when the president was supposed to be giving a major press conference on Irangate he got up and gave a plug for Bork. So the confirmation hearings on Judge Bork did turn into a national political debate. The Bork proceedings raise serious concerns because you don't want Supreme Court nominees making campaign pledges like, "I promise I'll be here for you on abortion," or waving banners on the various issues.

The Bork controversy certainly raised some specters, but it also raised, in a fundamental way, in a public way, a major political debate within the Senate on exactly what the role of senators should be. I'd like to present some quotes which reflect very respected points of view on this debate. Senator Robert Dole who was the Senate president said words to this effect: "You should just look at the ability and the integrity of the judge. If we go beyond this and require that judicial candidates pledge allegiance to the political and the ideological views of particular senators or interest groups, we will do grave and irreparable violence to basic separation of powers' principles. These principles act as the ultimate safeguard against the tyranny of the majority." Then you have Senator Hatch, who said that a senator should not evaluate according to the political or judicial philosophy of the candidate. Senator Patrick Leahy from Vermont, said: "No, we are equal partners with the president, equal partners in the judicial appointment process, and we not only have the right, but the duty to look at what these nominees stand for." In fact, one of the major quotes that all of the senators who were against Bork used came from Charles Black, who is a very well known Yale professor in constitutional matters. He said, "A senator not only may, but generally ought to, vote in the negative if he firmly believes on reasonable grounds that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the court."

I think both points of view have great merit, and there was a great deal of fear when Bork was probed in detail on his judicial opinions and philosophy. In fairness to Bork, I must point out that he answered those questions. When another judge on the bench was asked about his opinion on a noncontroversial historical case, he said he didn't think he should give an opinion on an issue that might come before the court. Nina Totenberg does a great job on this. When he was asked about the Freedom of Information Act, which he criticized on many occasions before he was a judge, he declined to answer. Asked about the conflict between personal privacy and national security, he said, "I believe in both principles." Bork answered the questions, and I think gave the public a fair view of what his philosophy was. Basically, Bork's problem was that too many didn't like his philosophy.

Post-Bork Nominations

After the Bork proceedings, there was concern that every single nomination was going to turn into an ideological battleground over the weighty issues. That hasn't happened, but I do think that the Ginsburg nomination has raised another set of issues.

In a recent issue of the *Harvard Law Review*, a professor at Yale espoused the point of view that senators shouldn't probe judicial philosophy because they're not educated enough to handle the nuances. He believes that it is important to inquire into the moral background of the judge, for example, an affiliation with a club that excludes blacks. He went as far as saying that a proper inquiry might include asking a nominated woman whether or not she had had an abortion or asking a man or woman whether or not he or she had committed adultery. Those questions make me very uncomfortable, but the point of this scholar's article was that it's the moral stature of the nominee, not his/her judicial philosophy, which should be the Senate's concern. The question on Judge Ginsburg's marijuana smoking was essentially an inquiry as to whether he was morally fit to be a Supreme Court justice. The focus was not on his competence but on whether or not somehow he was of poor moral character because he smoked marijuana when he was a professor at the Harvard Law School.

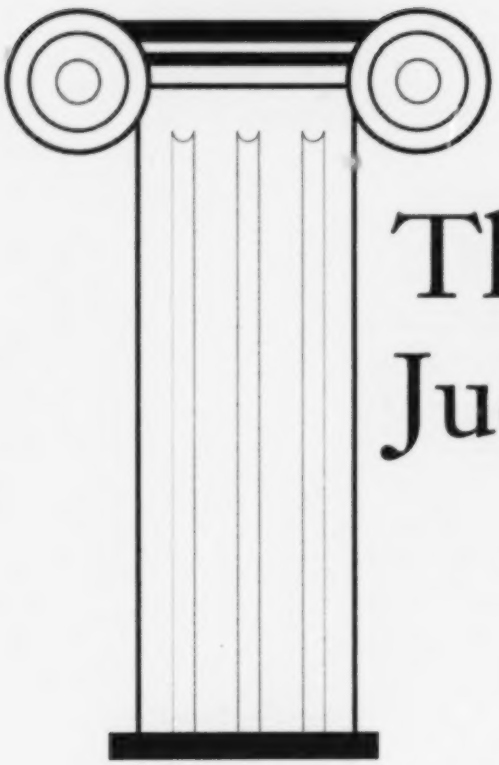
Finally, the confirmation process concerning Judge Kennedy went relatively smoothly. Even though the women's groups came out and opposed him on certain issues like comparable worth, basically the Senate felt comfortable that he was within the broadly acceptable parameters on major issues of the day, and he was quickly confirmed.

Continuing Political Interplay Over the Court

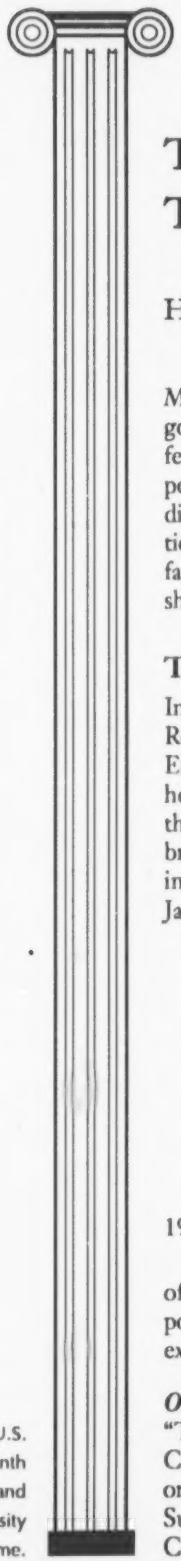
In conclusion, it is important to remember that the Court is a political institution, which is an integral part of our constitutional system of checks and balances. The decisions the justices make affect everybody, but judges don't have the legitimacy of being elected periodically. There are checks on the judicial branch. When Congress doesn't like the interpretation given by the Supreme Court on a statute, it can, and does, act to make the statute's intent clear. When Congress didn't like the way judges were exercising their sentencing discretions, it passed a new sentencing law that basically harnessed the discretion of the judges.

The court doesn't have enforcement authority. I always remember that great quote which I think is from Andrew Jackson, "Now that the Supreme Court has spoken, let it go out and enforce its decision." The confirmation process is essential to the legitimacy of the federal courts because the public knows that judges have

received a certain blessing from the president and the Senate. I think that's important and a good thing. While the Bork controversy raised serious concerns about the proper scope of a confirmation hearing, I believe that on the whole the confirmation process works the way our founding fathers wanted it to.



The Judiciary



The Article III Judiciary—The Ideal and the Reality

Hon. Kenneth F. Ripple

My assignment today is to speak to you about the constitutional institution of government for which I, together with my colleagues, share responsibility—the federal judiciary. I plan to present this material from two rather distinct perspectives. First, using the actual text of the Constitution as my guide, I shall discuss the essential function of the judiciary and describe its current organization. In the second part of my remarks, I shall suggest some of the major issues facing the judiciary as an institution today—issues that you and your students should explore in your classroom sessions in the academic year ahead.

The Basic Plan—The Judicial Article

In his classic *The Supreme Court in the American System of Government*, Justice Robert H. Jackson describes the unique roots of the Supreme Court. In Europe, most judicial bodies had evolved as subordinates of the monarch, but here the judiciary is a constitutional unit of the sovereign—not a subordinate of the sovereign. Its judges are not, either in the technical sense or in the broader, popular conception, employees of the government. Rather, they are, in their own right, constitutional officers of government. Wrote Justice Jackson:

> The Supreme Court of the United States was created in a different manner from most high courts. In Europe, most judiciaries evolved as subordinates to the King, who delegated to them some of his functions. For example, while the English judges have developed a remarkably independent status, they still retain the formal status of Crown servants. But here, the Supreme Court and the other branches of the Federal Government came into existence at the same time and by the same act of creation. "We the People of the United States" deemed an independent Court equally as essential as a Congress or an Executive, especially, I suppose, to "establish Justice, insure domestic Tranquility," and to "secure the Blessings of Liberty to ourselves and to our posterity."

1955, p. 9, n. 10.

The constitutional mandate of the judicial branch is contained in Article III of the Constitution—often called the judicial article. It is brief and to the point. As constitutional scholars should, let us begin our own inquiry with an examination of the text.

Organization

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The Constitution itself creates only one court—the Supreme Court. As part of the system of checks and balances, it leaves to Congress the determination of what "inferior courts" the country needs.

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Indeed, throughout our history, Congress has altered, on several occasions, the structure of the court system.

Today, we basically have a three-tier structure. United States district courts are trial courts, and the Congress has subdivided the entire country into judicial districts in which these courts operate. A number of these judicial districts comprise a circuit. Appeals from all the district courts in the circuit are heard by the United States court of appeals for that circuit. A further appeal is possible to the Supreme Court of the United States—if that Court decides to hear the case. While about five thousand cases seek review at the Supreme Court each year, only about two hundred are heard. In most cases, therefore, the judgment of the court of appeals is the last word. (I should point out in passing that the Supreme Court can also hear cases from the highest court of each state when the case involves a question of federal law.)

There are, of course, other specialized tribunals such as the United States Court of International Trade. Congress has also created other tribunals, which are not technically "inferior courts" within the terms of Article III but whose judgments are reviewed by Article III courts—the United States Claims Court and the Court of Military Appeals are good examples. Bankruptcy matters before a district court are usually handled by the United States bankruptcy court, which is an adjunct of the district court.

Judicial Officers

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

There are three basic types of judicial officer for the United States Courts. The Supreme Court is composed of nine justices—one chief justice of the United States and eight associate justices. The courts of appeals are manned by circuit judges, the district court by district judges. All of these men and women are appointed by the president with the advice and consent of the Senate. While their tenure is often described in common parlance as "life tenure," they actually serve during "their good behavior," since they are removable by impeachment. As a further guarantee of independence, their compensation may not be decreased. District judges are assisted in their work by bankruptcy judges and magistrates. These officers hold office for a term of years and are appointed by the courts of appeals and the district courts, respectively.

The Work

The second section of Article III describes the work of the federal courts. It is a rather focused assignment. Federal judges are to deal with "cases" and "controversies" involving questions of federal law or involving citizens of different states.

As Chief Justice Warren explained in *Flast v. Cohen*, 392 U.S. 83 (1968), the framers restricted the work of the federal judiciary to "cases" or "controversies" for two important reasons: (1) to limit the work of the courts to what courts and judges are trained to do—decide *real* cases between real litigants after the issues have been sharpened by the adversary process, and (2) to "assure that the federal courts will not intrude into areas committed to the other branches of government" (94, 95). In short, judges are to apply the law to disputes. The political branches directly responsible to the people, on the other hand, are charged with the task of formulating policy.

This restrictive role for the courts is, nonetheless, a most important one in the governance of our country. It has been recognized ever since the famous decision of Chief Justice Marshall in *Marbury v. Madison* that in the course of deciding "cases" and "controversies" it will sometimes be necessary for judges to interpret the Constitution and, when a law enacted by the political branches conflicts with the Constitution, to prefer the Constitution.

Interpreting the Constitution is a most delicate task. The Constitution embodies the most fundamental values of our political community. However, it presents them in only the most schematic form. As Chief Justice Marshall put it in *McCulloch v. Maryland*, 17 U.S. 316 (1819):

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

17 U.S. at 407.

Through constitutional interpretation judges perform essentially two tasks. First, judges must deal with questions of allocating constitutional power. They must "strike the balance" between the spheres of federal and state authority. Occasionally, they must even attempt to delineate the proper allocation of power between the branches of the federal government. Second, judges must restrain all government power from interfering with individual liberty. As Justice Frankfurter put it, cases in this latter category present "the most delicate and most pervasive of all issues . . . for these cases involve no less a task than the accommodation by a court of the interest of an individual over against the interest of society." Frankfurter, *"Some Observations on the Nature of the Judicial Process of Supreme Court Litigation."* Proceedings of the American Philosophical Society 98 (1954): 233, 234. Continued the justice:

> A judge whose preoccupation is with such matters should be compounded of the faculties that are

> demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof (237).

Current Issues: Evolution or Erosion?

Now I'd like to turn to something that is more current and that I think you ought to consider presenting to your students in the years ahead—that is the current issues involving the Article III branch.

The Constitution of the United States can be formally amended only through the painstaking amendment process of Article V. Yet the constitutional institutions of government—including the Article III judiciary—can undergo substantial transformations without our ever changing a single letter of the document. Political and economic events can, over time, cause significant change in these basic institutions of government. Unless these forces are carefully monitored, they can destroy the essential institutional characteristics contemplated by the Constitution. In this second part of my presentation, I shall identify some of the key constitutional attributes of the federal judiciary and then suggest some of the dangers each faces today.

Constitutional Attributes of the Judiciary

Independence. Although the word is never mentioned in Article III, one concern pervades the structure it sets up—*independence*. Judicial independence is a very important guardian of the integrity of our constitutionalism. It nurtures a certain quality of mind and spirit. It encourages the judge to look beyond the exigencies of the moment and to decide cases in conformity with the enduring values of the Constitution. We expect a judge to "take the long view of things." We expect the judge to study, to reflect, to pray—and then to decide.

Personal Responsibility and Accountability. Justice Brandeis said that the justices of the Supreme Court are respected because they do their own work. The American people presume that the decision of the court is the decision of the judge—an individual who has been subjected to the special scrutiny of the appointment process. The late Bernard Ward, speaking to a group of federal judges, put it this way:

> The Third Article has caused the buck to stop with you. The Third Article has caused you to be, in effect, the conscience of the nation and there is no withdrawing from that. That is our Constitutional scheme.
>
> ...The responsibility is enormous. But it is not going to go away. It's there because you are assigned as a prisoner of the Third Article. It is as simple as that.

Ward, "The Federal Judges: Indispensable Teachers," *Texas Law Review* 61 (1982): 43, 45-46.

Continuity and Collegiality. Over the course of the nation's history, a very distinct tradition of institutional discipline and dedication has developed within the judiciary to preserve its essential role—as Chief Justice Rehnquist has put it, as "keepers of the covenant." On the day he retired from active service on the Supreme Court, Chief Justice Warren reflected on two important aspects of the judiciary's institutional life—its collegiality and its continuity. Speaking in terms of the Supreme Court, he said:

> ...it is a continuing body as evidenced by the fact that if any American at any time in the history of the Court—180 years—had come to this Court he would have found one of seven men on the Court, the last of whom, of course is our senior Justice, Mr. Justice Black. Because at any time an American might come here he would find one of seven men on the Bench in itself shows how continuing this body is and how it is that the Court develops consistently the eternal principles of our Constitution in solving the problems of the day.
>
> ...
>
> We do not always agree. I hope the Court will never agree on all things. If it ever agrees on all things, I am sure that its virility will have been sapped because it is composed of nine independent men who have no one to be responsible to except their own consciences.
>
> It is not likely, however, with human nature as it is, for nine men to agree always on the most important and controversial things of life. If it ever comes to pass, I would say that the Court will have lost its strength and will no longer be a real force in the affairs of our country...
>
> In the last analysis, the fact that we have often disagreed is not of great importance. The important thing is that every man will have given his best thought and consideration to the great problems that have confronted us.

395 U.S. at x-xi (1969).

While life tenure was designed to protect the independence of judges, it also produced the continuity of which the Chief justice spoke. Life tenure was not simply a protection of the judge: it was a standard of commitment. Acceptance of the letters patent of the president was accepting a lifetime commitment to a special way of life with special restrictions and special responsibilities. Consequently, the judiciary of the nation contained the accumulated experience of judges appointed by many

presidents over a long period of time. When I joined our court, the oldest member had a commission that was signed by Franklin Roosevelt. The constant interaction of judges, in an atmosphere of rational discourse far removed from transitory political concerns, produced a jurisprudence of principle, not of politics.

The long-term commitment, the constant interchange of ideas, and the consistent mutual growth of the members of the judiciary produced an atmosphere of collegiality rooted in the principle symbolized by what every judge does before he or she goes on the bench every morning—shaking hands with his or her colleagues. It's a symbol that there is one court, one country.

The Assault

It would be nice to think that that's where we could end—the constitutional attributes of the Article III judiciary. But I respectfully submit that these individual qualities of mind and spirit that have marked the federal judge and these institutional characteristics that served as a safeguard to judicial independence are being subjected to severe stress. Without altering a word of the Constitution, we may be well on our way to altering the fundamental character of the federal judiciary. The factors producing that change deserve your thoughtful consideration.

Increase in membership. The first of these factors is the increase in the membership of the judiciary. The tremendous increase in federal litigation during the past decade has required that Congress increase significantly the number of judgeships in both the district courts and the courts of appeals. In a collegial body, the addition of a single member does not simply add a new vote. The presence of the new member alters substantially the entire "collegial chemistry" of the body. A new amalgam of views must develop; new working relationships must be forged. In short, a new collegial chemistry must be established. During the past several years, most federal courts have gone through a significant period of "collegial destabilization" as the membership in the body changed at a very rapid pace. Since 1980 there has been one new judge almost each year on my particular court. Other courts—for instance, the Third Circuit—have not had quite as many. Nationwide, this is a significant phenomenon.

"Politicalization." The second factor is what I would term politicization. There can be no question that political considerations have always entered into judicial appointments. Indeed, by vesting the appointing authority in one political branch and the confirmation authority in the other political branch, the Constitution contemplates the presence of political considerations. Unfortunately, over the past two decades, this reality has become an all-encompassing preoccupation. Consequently, the appointment and confirmation process often leaves its mark on the new judge and makes his integration into the collegial body far more difficult.

This overemphasis on the political aspect of the appointment process has also had a very detrimental effect, in my view, on the public's perception of the work of the court and indeed of the nature of our legal process. Today, the American citizen is deluged with all sorts of information about the political inclination of judicial candidates for judicial office. Political interest groups openly support specific candidates for judicial office. Their professional work is reduced to the equivalent of a "box score" for public consumption. The average American begins to wonder if there is any difference between law and politics. He loses confidence in the hundreds of dedicated men and women wearing judicial robes who go to the courthouse each day to work with their colleagues in producing a jurisprudence of principle that reflects the enduring values of the Constitution.

Bureaucracy. The tremendous increase in the number of filings in the federal courts in recent years has required the courts to experiment with new approaches to case management. The increase in administrative personnel who deal with the difficult task of case flow management and the increase in the use of computers to monitor that case flow frankly pose little threat to judicial independence or any of the other essential qualities of the judiciary. Indeed, without such assistance in manning the dikes, we would all soon be buried in a paper avalanche. However, the increase in legally trained support personnel who assist the judge in working on the merits of the case poses a significantly different problem. Overdependence on such assistance poses a direct threat to the tradition of personal accountability. The challenge we face is to make use of professional staff assistance while at the same time avoiding overdelegation of the judicial role by the acceptance of "school solutions" to recurring jurisprudential problems. Control and supervision must come from the person who bears the constitutional responsibility for the work product. The specter of bureaucratization of the federal judiciary is a real one. If it is not to become a reality, judges must remember Justice Brandeis's comment that judges are respected because they do their own work.

Economics. There's an additional factor that threatens the constitutional attributes of the judiciary—economics. The judiciary's continuity and collegiality are also directly threatened today by the present compensation benefits package afforded to Article III judges by the political branches. This problem is not at all dissimilar from the one that plagues your own profession and about which Derek Bok spoke so eloquently at this year's Harvard commencement. As I noted earlier, the commitment to the federal judiciary is designed—constitutionally designed—to be a long-term commitment. It is also meant to be a job demanding total concentration and total

dedication to the judicial work of the nation. The level of compensation benefits must be sufficiently high to attract and to retain men and women of the caliber the judiciary has traditionally attracted. No person ought to become rich by becoming a federal judge. However, he or she ought not to have to worry about being able to fulfill with reasonable ease the basic obligations of life—the education of one's children, provision for catastrophic illness, or the old age of one's spouse.

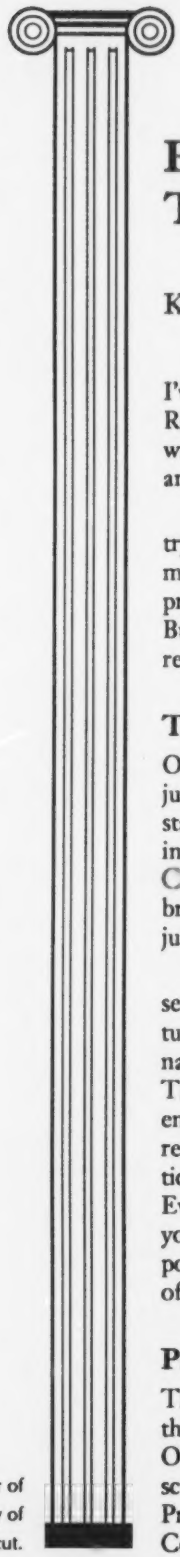
Two aspects of this problem are becoming especially acute. First, in an attempt to increase the long-term experience level of judges, the nation has turned, in recent times, to men and women whose age will permit long-term judicial service and has asked them to make a long-term commitment to judicial work. Unlike their predecessors, these men and women have not yet had an opportunity to attain that level of financial security that will permit one to undertake government service with no concern about the financial arrangements. If these men and women are lured from the judiciary to partnerships in large law firms, where their level of compensation may be four or five times greater, the traditional continuity of the federal judiciary will indeed be seriously affected. Moreover, I have already noticed the effect that present inequities in judicial compensation have on the collegial function. It is indeed disheartening to join one's colleagues for the little time we are able to spend together in thoughtful conversation only to have the focus turn quickly to questions of economic survival.

The second problem precipitated by the present economic situation could affect the character of the judiciary far more profoundly. The failure of the political branches to deal with the issue of judicial compensation will create a very significant barrier to the entry of many capable young men and women into the judiciary. Over the past two decades, the legal profession as a whole has welcomed members of ethnic and racial minority groups in far greater numbers than previously. Shortly, those men and women will be at the stage of their careers where consideration for judicial office will be a reality. However, their enthusiasm for judicial service will be significantly dampened if the price for accepting such responsibility is to recommit their families to the financial insecurity from which they have just emerged.

In short, there is a very real danger that, over the next generation, membership in the federal judiciary will change drastically. It will either be populated by lawyers who could not compete successfully for a responsible position in the private sector of the profession or it will become populated by an American equivalent of "landed class." As I previously noted, the judicial life is a relatively cloistered one. It is removed from the political world, and the demands on the judge's time prevent his or her participation in many of the other activities of human life. Therefore, to some degree, a judge must depend on his or her previous experience in order to appreciate how the average American lives. If our future judiciary does not reflect the diversity of our country, those who are charged with the responsibility of ultimately interpreting the basic values of our political society will have lost touch with that society.

Conclusion

In your discussion of the judiciary in your classes, I hope you will not limit your inquiry to a description of its organization, officers, and work. I hope you will also challenge your students to identify and appreciate the essential constitutional characteristics of the judiciary—independence, personal responsibility, continuity, and collegiality. I also hope you will stress that these qualities are not immutable. They will endure only if our political society as a whole is willing to nurture them. The judiciary has no other protection.



Focal Themes and Issues for Teaching About the Federal Judiciary

Kent Newmyer

I've been asked to talk about the Supreme Court in the formative period. Rather than presume to take you through the narrative history of this period, I will suggest the kinds of issues you might want to emphasize in your teaching and briefly suggest some of the dimensions of each.

The first thing to do if you're teaching school is to clarify what it is you're trying to teach, to establish the object of your teaching. And in this case, the main theme is judicial authority and judicial review. After Judge Ripple's presentation, it's presumptuous of me to say much more by way of definition. But there are a couple of small points I've discovered in my teaching that require clarification, that are often sources of some confusion.

Types of Judicial Review

One has to do with the various kinds of judicial review: one kind involves judicial review of acts of Congress; the other involves the judicial review of state legislative acts and state judicial interpretation of those acts—both very important in the early republic. The first of these, judicial review of the acts of Congress, is a separation of powers question—that is, it involves the various branches of the national government in a kind of power struggle. The other, judicial review of state acts, is of course a question of federalism.

The interesting thing is that in the period we're talking about it's really the second of these, judicial review by the Supreme Court of acts of state legislatures or decisions of state courts, that is by far the most important because the nature of federal union itself was at issue. And so it's a point to keep in mind. The other thing—and this became obvious in Judge Ripple's comments—is to emphasize to your students that judicial review is not just saying yes or no to requests of power by the parties in litigation. Rather, it's the reasoned justification by which judges explain the meaning of the Constitution. As Charles Evans Hughes once said, "The Constitution is what the judges say it is." What you're trying to do when you're dealing with the formative period of judicial power is explain, how did this incredible proposition become an accepted part of the American system of government?

Paradox of Judicial Authority in a Democratic Polity

That leads to the second point that I suggest as a useful teaching device, and that is to emphasize the paradox of judicial authority in our democratic polity. Oliver Wendell Holmes said that there's nothing like a paradox to take the scum off your mind—and I've found it's useful for keeping students awake too. Presenting a problem or a puzzle is frequently an easy way to get them hooked. Certainly judicial power is a paradox, and it's one that has probably occurred to

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you already. That is, how can nine people who are not elected—who are there (fortunately, as Judge Ripple pointed out) for life, have so much power? All you have to do is read the newspaper to figure how much power they have. They can tell you where to send your kids to school, they can tell you whether you can pray in school or not, they can tell you what you can't do in the bedroom, etc. How did these nine people whom you didn't elect and can't get rid of get so much authority? After all, aren't we're supposed to be a democracy? In a representative system the political branches are supposed to have the clout, so how did it happen that you've got these judges with so much authority?

I would say that's the paradox, and if you can lay that on your kids, I think you might assume they'd be curious as to how this came about. So how do you resolve the paradox you've set forth? The first thing to do is to look to the Constitution itself in exactly the way that Judge Ripple said you should. Turn to the key articles of the Constitution that deal with the question of judicial authority, and take your students through them, sentence by sentence. What you begin to realize is that judicial review, this incredible grant of power to the judiciary, was not usurpation. This charge of usurpation keeps coming up when the Supreme Court hands down a decision that isn't very popular. People say, "Hey look, they shouldn't be doing that in the first place," and so on.

Articles III and VI

But if you consider the Constitution, the grant of power to the Court is extraordinary. Look at Article III, and add to it Article VI, and you've got the logical case in the Constitution itself for some sort of judicial control. Article III establishes the powers and defines the jurisdiction of the Court. Article VI is equally important because it says that the Constitution with the laws and treaties made under the authority of the Constitution shall be the supreme law of the land. What Article VI does is establish a kind of hierarchy of law at the very top of which is the Constitution and below that, federal statutes, federal treaties, and next, state law, and state constitutions.

When you've got two parties in litigation each claiming under different law, when you've got a conflict between the state law and a federal law, or a state law and the Constitution, the Court has to rule in favor of the Constitution or the federal law. Somebody has to win. In other words, the Court can't escape the responsibilities of judicial review that are built into the Constitution. That, I think, is the kind of line of reasoning you ought to use when you're trying to resolve the paradox by use of the constitutional text.

There's another way you can help resolve the paradox of this incredible grant of power. Again you're dealing with the question, how could it happen, especially since the Constitution doesn't say specifically that the Supreme Court shall have the power of judicial review? If it did, then there wouldn't be anything for historians to do, I suppose.

Historical Context

Historical context is another area that you might concentrate on. In other words, if you put the Constitution in the context of the times, you begin to see why the founders did what they did in regard to judicial power. What, briefly, are the things that you can look at?

Higher Law Tradition

For one thing, people in the eighteenth century were familiar with what Edward Corwin called the "higher law background of the Constitution." Whether it was the biblical tradition or the tradition of the English common law there was the notion that certain principles are supreme, eternal, unchanging, and that the ordinary positive law is accountable to those principles. Does not the Constitution itself, a written document with self-declared supremacy, fit into this whole tradition of higher law? After all, the colonists were somewhat familiar with the idea that law passed in the ordinary course of things is held up to review by the king and council back in England. The idea that laws are reviewable was something with which the colonists were familiar.

State Constitutional Experience

The state experience provides a similar kind of historical context. Remember, the state constitutions preceded the federal Constitution, and we're now just beginning to discover how important the state constitutional experience was. Judicial review, in South Carolina, for example, was well established in the eighteenth century, so again the idea that the founders discovered this or just cut it out of whole cloth we now know is not true.

Tradition of Conservative Governance

One other thing needs more emphasis if you are considering the context of judicial review, and that's the tradition of conservative governance. The Supreme Court is a very aristocratic institution when you think about it, and that's the source of the paradox. But in the eighteenth century it wasn't a paradox, because people in positions of power were accustomed to exercising tremendous discretion. If you want to trace the source of judicial review to John Marshall, look at him in the context of Virginia politics. It was his assumption that people in positions of power should actually rule. So why, when he gets to be chief justice, shouldn't he continue to do just that?

So you see the line that I'm presenting. Even if you look at the document, if you look at the context, you can say that there is a strong tendency in the direction of judicial review in this whole institutional, ideological arrangement.

Original Ambiguity on Scope of Authority

Yet the point is, as you all know, that the nature and finality of judicial power wasn't nailed down. Many things were uncertain. Even if you admit that the Court can declare an act of Congress unconstitutional, or an act of the state legislature unconstitutional, there is the question of the scope of the Court's ruling. Is what the Court says, for example, binding on Congress, or is it simply binding as Thomas Jefferson said, on the parties in litigation? Does it just settle a case and not the Constitution? The judges' view of the Constitution, Jefferson said, is no more sacrosanct than the view of a congressman or the view of the president. When we stop to think about it, isn't that the logic of separation of powers? In other words, there is still a lot to be explained about how the courts can say "this is the Constitution" or "the Constitution is what the judges say it is." We still have to answer this basic question.

The Dramatic Potential in Constitutional Legal History

What are other points to focus on as teachers? I think a little drama is very useful in teaching constitutional and legal history, which can get to be pretty dry stuff. In this early period, you've got a ready-made drama in the personalization of politics. Remember that when Marshall became chief justice in 1801 he was a Federalist. The Federalists had just gone out of power, and the Democratic-Republicans, with Thomas Jefferson as president, had captured both houses of Congress and the presidency. So the separation of powers question was overlaid with an explosive political situation, all personified in a magnificent hatred between Jefferson and Marshall, who were cousins—and both Virginians.

As a matter of fact, American constitutional history in the formative period is in large part a dialogue among Virginians. It's amazing: you've got Madison, father of the Constitution, Marshall, the great chief justice, and Jefferson, the great antagonist to judicial power. And of course *Marbury v. Madison* and the Burr treason trial pitted these two great minds against one another. When you teach, use this dramatic potential.

Theory and Justification for Judicial Rule: *Marbury v. Madison*

Another thing I would emphasize, which maybe doesn't quite come through in most textbooks, is the theory and justification for judicial review. There has to be some theoretical justification, because you've got a paradox: an aristocratic institution in the midst of a democratic polity. If you're going to establish that institution, there has to be some justification of judicial authority. Judge Ripple again alluded to this point when he quoted Robert Jackson's great study of judicial authority.

But I would emphasize the point again, and put it this way: What the Court had to do, as an aristocratic institution, was establish its democratic credentials. Somehow or other it had to demonstrate that it was as democratic as the political branches. Marshall did exactly this in the case you already know, *Marbury v. Madison*. The argument, briefly, was this. The great source of authority in our country is the people—popular sovereignty is our original contribution to political theory. When do the people as a sovereign speak? They don't speak as a sovereign in an act of Congress. That's a great misconception. As a sovereign they speak only in organic convention and they spoke so in 1787. And what did they say when they spoke? They said that the Court stands on an equal footing with the other branches. How do you know? Because it gets its own Article in the Constitution, its own constitutional mandate. What Marshall said to his old enemy Tom Jefferson was, if you doubt the Court's powers just read the Constitution. Marshall's opinion in *Marbury* along with that in *Cohens v. Virginia* still stands today as the first and last word on the powers of the Supreme Court.

But they would have come to nothing except for the institutional changes that Marshall made in the way that the Court goes about its business. The key reason the Court wasn't well thought of during the first decade of its history was that each justice handed down a separate opinion, *seriatim*, as the lawyers say. What did this mean? It meant that the Supreme Court could not speak in a single voice about the meaning of the Constitution. As long as each justice spoke separately, Jefferson could say, "Hey look, my opinion is just as good as what you guys think. You got six people up there; you all disagree." If you want to find out what the Constitution means, you can't go to Court reports because the Court doesn't speak clearly. Marshall persuaded his colleagues to speak in a single voice, in a majority opinion. This act of leadership created an institutional revolution that is the key to judicial review, the *sine qua non* of judicial authority. In this regard, at least, the Court hasn't changed from that day to this.

There are many other things that have changed. Judge Ripple mentioned the importance of law clerks. On the early Court, you know, justices did their own work. They lived together in a boarding house and even held informal conferences there. They wrote their own opinions. They didn't have access to a printing press as Supreme Court justices do today. Life was simpler then.

Other Comments on What to Teach

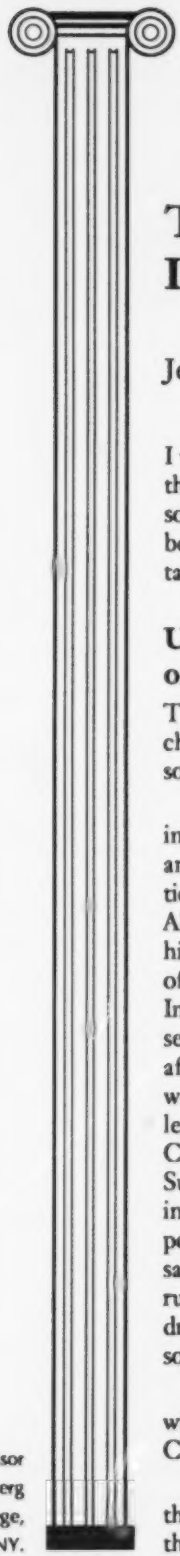
Just a couple of other comments on what you might also look at when teaching about the early Court. It might be fun, if you've got time, to emphasize the personality of John Marshall. How, you might ask, did he persuade the Supreme Court to agree to a majority opinion, especially

when he ended up writing most of them, in fact, all but a handful until 1811, and all of the important ones? It was an amazing monopoly. You have to ask yourself, what sort of personality could do this? Charismatic he clearly was. He was an aristocrat who was a democrat. He had a magnificent way with people. He was truly humble, which is the bane of historians, because he was casual about saving his personal papers. He wasn't like John Adams; he didn't leave a multivolume diary to explain everything. He didn't even keep his mail. But somehow he fit the age, was, as Holmes said, "a great ganglion in the nerves of society," and this angle is good stuff to explore in the classroom.

This leads to another interesting theme—mythology. What does something like mythology have to do with the science of jurisprudence or with the history of American law? The borning years of every nation are steeped in myth as part of the legitimating process. Marshall was a part of that myth. In other words, every nation's jurisprudence in the formative period needs a Prometheus—somebody who rescues it from chaos; somebody whom people can turn to when things get rough, uncertain and anxious, as they are in the present age; a person we can turn to for absolute truth and purity. In other words, regardless of what John Marshall really was, he has become a Prometheus, a heroic figure, and that fact itself is important in shaping American jurisprudence.

The Importance of McCulloch

Let me say finally that if you want to look at an opinion that pulls it all together—the real meaning of judicial review, the real institutional character of the Court, the real charismatic qualities of Marshall and his legal brilliance, look at *McCulloch v. Maryland.* It's a magnificent opinion. It is interesting that after Marshall handed that opinion down, he wrote a series of nine anonymous essays in the newspapers defending it. Those are now published in Gerald Gunther, ed., *John Marshall's Defense of* McCulloch v. Maryland (Stanford, 1969). If you have any doubts about the brilliance of this guy, look at those essays. He whipped them off while he was riding circuit in the course of a few months. They're quite dazzling, and so are the essays written against him by Spencer Roane of Virginia. The essays provide a marvelous teaching device and show Marshall at his grandest.



The Work of the Court and Sources of Information About It

Jeffrey Morris

I want to address two topics briefly. The first is the unusual characteristics of the work of the Supreme Court of the United States; the second is some sources and materials on the Supreme Court of the United States which might be of some help, or at least which I have found of some help in the years I have taught constitutional law.

Unusual Characteristics of the Work of the Supreme Court

The Supreme Court of the United States is an extraordinary court. Many of its characteristics are shared by other American courts. We just feel them, I think, so much more deeply when we look at the United States Supreme Court.

The first, of course, is the continuing involvement of the High Court in important questions of public law. The Court was but a few years old and not an institution of great prestige when it had to deal on circuit with the application of Washington's proclamation of neutrality and with the application of the Alien and Sedition Acts. And indeed from that first decade in the Court's history until today, the docket of the Court has been full of the great questions of American domestic political life—coming up, of course, as legal questions. In this very term we're going to have from the court the resolution of a whole series of questions connected with the death penalty, with abortion, with affirmative action. And perhaps the most dramatic case of this term is still waiting to come down—the constitutionality of the independent counsel legislation. So we're accustomed to this continuing involvement of the High Court. Second of all, from the beginning and continuing to the present, the Supreme Court of the United States has been the source of significant initiative in public policy making. Professor Newmyer just spoke about the Marshall period. But again, throughout its history, we have the Taney court and the sanctioning of state police powers, the White court and the application of the rule of reason to the Sherman Antitrust Act, and so forth to the present—most dramatically, of course, in modern times with the work of the Warren court in so many areas.

Third, what makes the Supreme Court quite a remarkable court has been its willingness at least from time to time to risk challenge from the president, the Congress, the states.

Fourth, the baggage that of course comes with it is the fact that the work of the Court is a continuing source of controversy. There is never a time where the Court lacks for critics—and very strong critics.

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Fifth, as a court the Supreme Court really is basically a public law court. The kind of law that we all think of in living our own lives—laws governing family life, wills, real estate, torts, contracts—almost never, in these times, come before the Supreme Court of the United States. And indeed the Supreme Court of the United States makes almost no contribution to the resolution of cases in these areas.

The Supreme Court of the United States is really quite a specialized court. It's a court for American public law. It is a constitutional court. The basic essence of the work of the Court is both constitutional and statutory interpretation. And now I suppose we would add that it is, as well, a high criminal court.

Another unusual characteristic of the Supreme Court which begins during the Marshall period but becomes, I think, truly significant only eighty or ninety years later is the great tradition of dissent on the Supreme Court of the United States. Unlike many American courts in our history, there is not quite the same tradition of unanimity in the United States Supreme Court that there has been for much of our nation's history in many of the state courts and in many of the federal courts of appeals.

Materials on the Work of the Court

Let me, if I may, spend just a few minutes speaking about materials connected with the work of the court that in my teaching of constitutional law at the undergraduate level I have found to be quite helpful, and conceivably you might as well.

First, let me mention that actual opinions of the Supreme Court are available for a relatively short period of time, until supplies run out, from the Public Information Office of the Court itself, [Supreme Court of the United States; Washington, DC 20543]. This kind of request can be made for only a few decisions a year, but basically the court indeed does have the slip opinions.

Second, tapes of oral argument of the Court are available back through, I believe, 1953. When I last checked a couple of years ago, the most recent three years of argument are embargoed, but you can obtain cassettes of oral argument in the great or the minor cases since 1953—or at least I did for relatively nominal charges. The method there is to write to the marshall of the Court and request permission, explaining which cases you want and why you want to use them. When that permission is granted by the marshall to you, you then write to the National Archives and make the request. They then send you a letter indicating the cost, and your request moves forward from there.

Third, the briefs of the Supreme Court are available on microfilm in many law libraries, and copies of the original briefs are available in a handful of depository libraries throughout the country.

One of the difficulties I have found as a teacher is that we have at this moment in time no good short, single-volume history of the Supreme Court, no good volume in print of case studies of the work of the Court, and as far as I know, no single volume of short lives of the justices in print.

However, if the problem is not assigning full books to students but using them yourselves, there are a number of resources of extraordinary value. Let me mention some very briefly. There is first—and certainly major libraries will have it—the Oliver Wendell Holmes revised *History of the Supreme Court.*[1] That history is the result of the bequest by Justice Holmes to the United States of his fortune, such as it was, at his death. The story of the commissioning of these volumes and their writing is a very tangled tale indeed. Congress made the decision to do this in 1953 or 1954, and we still have a number of volumes not out, and indeed the volumes that are out are idiosyncratic, to say the least. Nonetheless, they are, I think, the deepest resource we have in print on the work of the Court, volumes of close to a thousand pages a piece covering various eras of the Court's history.

While there is no easily assignable one-volume set of biographies of the justices, there is for those who want information on the justices the five-volume lives of the justices that Friedman and Israel edited some years ago which give essentially fifteen- to twenty-page biographies of everybody who sat on the Supreme Court up through volume V (I forget where that leaves off—it may well be with Justice Stevens).[2] There are, in addition, dozens upon dozens of case studies of the work of the Court giving in readable and dramatic form the political and the legal backgrounds of the major cases connected with the Court.

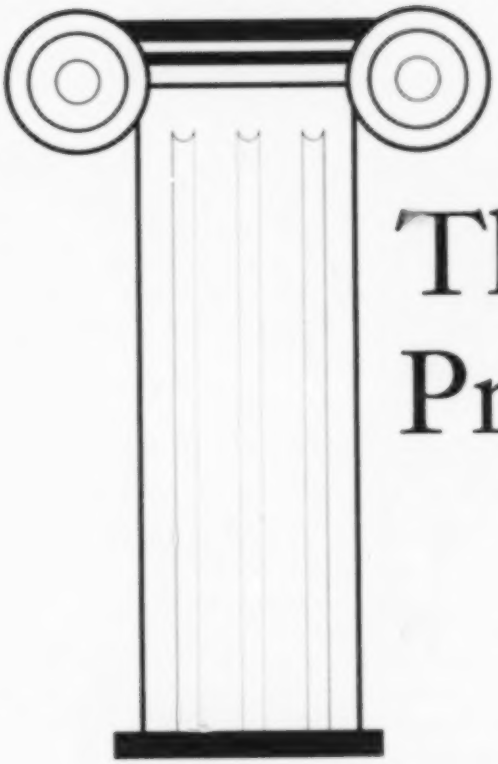
But let me mention briefly just two more resources you might wish to use. The first, if indeed it is worth it in class to use as examples cases that are pending in the Supreme Court itself, is the basic reference *U.S. Law Week*,[3] which, as the title suggests, comes out weekly. It has a Supreme Court edition that gives brief discussions of every petition for certiorari, lengthier discussions of every case granted certiorari, and descriptions or discussions of oral argument in many of the important cases, as well as the text of the opinions themselves.

Second and finally, let me bring to your attention what I think is the best one-volume work on the Supreme Court—that is the *Congressional Quarterly Guide to the U.S. Supreme Court*, which is a 1,500-page guide that covers the history of the Court in considerable depth, the justices in considerable depth, and the major cases in reasonable depth.[4] It's the sort of thing that I would suggest that every school library, at least high school library, ought to have. And many of you, if you're interested in this realm, might want it as well.

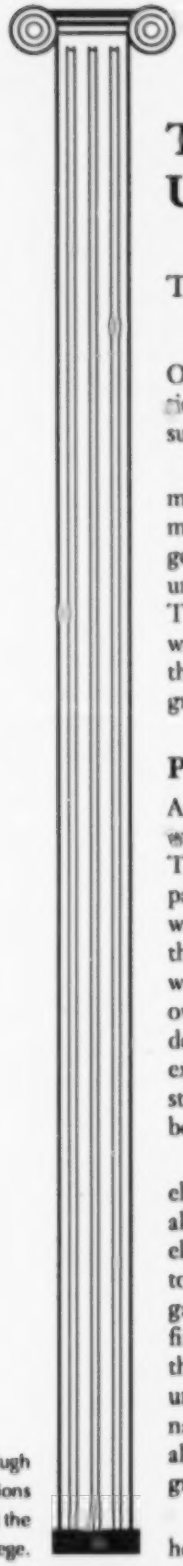
Notes

1. *The Oliver Wendell Holmes History of the Supreme Court*, ed. Paul A. Freund and Stanley N. Katz:
   - Vol. I: Julius Goebel, *Antecedents and Beginnings to 1801.*
   - II: George L. Haskins and Herbert A. Johnson, *Foundations of Power. John Marshall, 1801-15.*
   - III-IV: G. Edward White, *The Marshall Court* [published as one volume].
   - V: Carl Swisher, *The Taney Period, 1836-64.*
   - VI: Charles Fairman, *Reconstruction and Reunion, 1864-88*, part I.
   - VII: Charles Fairman, *Reconstruction and Reunion, 1864-88*, part II. Supplement to Vol. VII: Charles Fairman, *Five Justices and One Electoral Commission.*
   - IX: Alexander M. Bickel and Benno C. Schmidt, Jr., *The Judiciary and Responsible Government, 1910-21.*

   [Volumes VIII, X, XI have not yet been published.]
2. Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, 4 vols. (Chelsea House—R.R. Bowker, 1969). Vol. V: *The Burger Court 1969-1978*, ed. Leon Friedman (New York: Chelsea House Publishers, 1978).
3. *U.S. Law Week* is published by the Bureau of National Affairs, Washington, DC.
4. *Congressional Quarterly's Guide to the U.S. Supreme Court* (Washington, DC: Congressional Quarterly, 1979).



The Presidency



The Institution of the Presidency Under Article II

Thomas E. Cronin

Our task is to talk about the American presidency, Article II—why that institution was founded, what it's all about, and some of the enduring debates that surround the Constitution's Article II.

The well-bred, well-read, well-fed, and in most instances well-wed gentlemen who came to Philadelphia some two hundred years ago were up against a major challenge. They knew that they needed a stronger leadership and governing set of arrangements for a national government than had existed under the Articles of Confederation under the previous eight or nine years. They had indeed won the war against the British. They had crafted that wonderful document, the Northwest Ordinance, which brought in Ohio and the cities and the states to the west and set out a lot of principles that telegraphed how this, as a nation, could prosper and grow on equal terms.

Problems the Framers Faced

And yet there were some major problems. There were problems of lawlessness witnessed by the Shays's Rebellion types of activities in western New England. There were problems of how to negotiate treaties with different nations, particularly the British, the Spanish, the French, and Indians in negotiations or warfare to the west. There were problems of internal bickering among the thirteen sovereign or semisovereign—sovereign in their minds—states, which were beginning to establish tariffs and customs and their own navies and their own regulations on interstate commerce. There were problems of economic development. There were problems, on the horizon, of how they would expand south and west. There were problems also as to whether this group of states could function together collaboratively, cooperatively in such a way as to become a society or a nation.

Would they become a nation? There are many, particularly among the elites, and among those who had fought in the war from Virginia to Boston, along the Delaware River, along the Hudson River, in Massachusetts Bay and elsewhere, who wondered whether these independent states could make it together. Thus many people, particularly allies of General Washington, gathered together on a few occasions before they came to Philadelphia. But finally when they came in May of 1787, their challenge was how to do something that would be a little bit more strengthened and yet not disown, deny, or undermine the cause for which they had fought the American Revolution—namely, liberty and private rights, and independence and freedom, and personal liberty. That was the challenge—how to have a greater sense of direction, a greater sense of leadership, and yet preserve liberty.

In the process of their debates in Philadelphia, one of the most extensive and heated topics was on what kind of executive institution to formulate. Hitherto

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they had had virtually no executive on a nationwide basis. It was in essence a one-branch, one-house arrangement, what we would call these days—or what Benjamin Franklin loved to talk about because he celebrated it and tried to advocate it for the Constitution—a unicameral branch, a one-branch unicameral arrangement, with one vote per state, short elections of one-year terms, I believe, a rotating presiding officer who was called the president, but in fact no executive, independent executive.

The dream of many Americans was of self-governance, of representative government, of government by committees and deliberation, by hearings and consensus. They did not want, understandably enough, to have the second coming of George III. They wanted to protect against that. They dreamed of an alternative. Yet the history of the world thus far was rather bleak for representative societies. Athens and the Roman republic, and some of the small-city efforts that had representative processes in Venice and elsewhere, hadn't been able to really make a go of it. They did not prosper as they enlarged or had economic troubles. And so I think many of the people who read antiquity, knew history, and also studied the Enlightenment writers were searching. How could you combine this dream of representative government, in an extended sphere of territory that was bound to expand, with executive institutions that would not be monarchical along the lines of George III and the reign of English kings which had given so much trouble in the previous hundred years? That was the challenge before them.

Contentious Compromises on the Executive Power

What the framers settled upon in Philadelphia was an independent executive but with nearly all of the executive's powers to be shared with the Congress. Very little could be done or was desired to be done without collaboration. Perhaps the pardon power, one of the few imperial powers, was unchecked for all practical purposes, but most of the powers of the presidency are shared responsibilities. And that was the intent of the framers. They talked long and in heated debate about how long the terms should be, about the kind of veto power, about the war power and where that should be located, about how the person should be elected.

What's interesting about all those questions is that nobody was entirely pleased at the Constitutional Convention. They debated and came up in almost every case with compromise resolutions about term, tenure, re-eligibility, veto power, election process, shared responsibilities, and so on. Almost everything was a compromise. Everything was highly debated. On the term of four years, for example, they had twelve different proposals going from one-year terms to life terms with life tenure as we have with the Supreme Court, and everything in between with all kinds of convoluted combinations. They also had sixty different votes, just a few blocks from Independence Hall, on the questions of term, tenure, and re-eligibility. And they debated back and forth, and forth and back, all over the possibilities and the alternatives. They weren't sure.

When it came to September, or late August, when the Constitutional Convention had to settle on some things in order to get home and to try to get things going, the framers did come to some conclusions, but they were still debatable, and they were highly debated at ratifying conventions. Take the whole question, for example, of re-eligibility. Thomas Jefferson wrote from Paris saying, "I don't like two things about your Constitution"—to his friends who were here like James Madison, one of his dear friends. "I don't like the fact that there's not a bill of rights like what we have in many of the states, and I also don't like at all the idea of re-eligibility. You have a popular person and a war breaks out and that person's likely to be in for a lifetime." I might add, as an aside, that this didn't deter Thomas Jefferson from rerunning for office when he was president and got his chance a few years later, although he did step down, as Washington did, after two terms.

They debated everything fiercely. Take the matter of impeachment. Gouverneur Morris stood up one day and said, "I don't think we should have an impeachment process of our presidents. It would weaken our presidents." Benjamin Franklin, the eighty-one-year-old philosopher of America, burdened with gout and age, had to be carried in from his home nearby each day. He piped up: "If you don't have impeachment," he said to his younger colleague (Gouverneur Morris), "you're likely to have regular assassinations of your executives." Almost immediately after just a brief interval of discussion, Gouverneur Morris jumped up and said, "Gentlemen, I have changed my mind." He had been influenced on that point.

All through that hot summer, in secrecy, these three or four dozen gentlemen labored over these issues.

The Presidential Legacy of the Framers

On the presidency, what the framers left us has worked reasonably well, although we have amended it in different ways, and my two colleagues are going to speak to some of the ways it's been amended in terms of relationships between the two branches, and particularly in the war power. For two hundred years now that constitutional arrangement has served us reasonably well, but I think the best way to honor the framers of Philadelphia is to do what they would have done if they could be here with us or in our school systems, and that is to think very critically about what they did and think critically also of what those who hold public power and interpret the Constitu-

tion these days are all about—what their theories are, and what their values are. They would say, Don't just worship reverentially what we did. Be bold, be audacious, be critical. Think as we would have if we were back with you, or forward with you, in your day. In many respects, the Constitutional Convention of 1787 is still in session. For many of the great issues they debated, they settled temporarily with compromises, but in fact those issues about the veto power, the war powers, the impeachment processes, and the electoral college are still quite legitimately open for debate.

The framers of Philadelphia would, I think, encourage us to thoroughly debate the relationships between the branches and between the governors and the governed, and so along those lines I have a few more pointed remarks that I would like to make. I want to challenge you a little bit here and suggest that the presidency, two hundred years later, is probably one of the greatest surprises, or—how should I put it?—it has veered away from the intentions of the framers more perhaps than any other aspect of the Constitution.

New Challenges to Checking Executive Power

I think if Rip Van Franklin, or Rip Van Madison, Hamilton, or Morris, or Wilson, or others of those gentlemen could come back two hundred years later they would be surprised. Frankly, they'd be surprised about all three branches. All three branches are more powerful and have more capacious agendas and responsibilities than the framers ever conceived, I think. The country, of course, is seventy-five times bigger, and our responsibilities in the world are enormous. Our role in the world and our leadership responsibilities, not only at home but abroad and everywhere, have greatly expanded over what the framers probably thought would be the case.

But the presidency in particular has become an extremely powerful institution. We are worried as contemporary Americans when the presidency is too weak, which it is at some times, because of individuals or because of abuses that force us to encourage restraints and accountability constraints. But we also worry, and I would challenge you to worry, about a too powerful or overly powerful presidency. We should, for example, be necessarily and rightly bothered when the occasional Richard Nixon occupying the White House says, "When the president does it, that means that it's not illegal." As a friend of mine put it, "throbbing through the testimony last summer of Colonel North and Rear Admiral John Poindexter is an ill-concealed envy at the Kremlin's capacity to act as it wills without obstruction, restraint, or disclosure. The theory of divine right of presidents finds little substance in the American Constitution."

Shortcuts that bypass the checks and balances of our Constitutional system set up in Philadelphia some two hundred years ago and excessive secrecy by those who serve the president do not, in my judgment, serve the American people well nor do they serve the institution of the presidency. They usually weaken presidents and the constitutional system of checks and balances and accountability which we deserve.

Rarely, for instance, will a foreign policy stick unless the American people are behind it. Unless Congress understands the policy, the American people usually are not going to understand it and are not going to support it. It's fascinating to me that after the fact Bud McFarlane—I think the third of the series of six national security advisers that our president has had—belatedly came to realize, and I quote him, "One thing should be clear by now. No policy can hope to succeed unless and until it is explained and pondered by the American people, and they come to support it." These are the words of McFarlane, after the fact. This from the man who tried to woo the so-called moderate Iranians with cakes and Bibles.

An Enduring Ambivalence

We have as Americans, and I think you all probably share this, an ambivalence toward executive power. All of us admire the Washingtons, the Lincolns, the Jeffersons, and the Roosevelts. We yearn for creative societal breakthrough, creative leadership, especially when crises face the nation or when urgent causes are to be waged, particularly causes that we care about. Let's be honest about it. We also yearn for liberty, yearn to be free. We yearn to be less taxed and less bureaucratized, less regulated, less conscripted than is usually the case. We yearn, indeed, like the people in the founding generation, to be left alone and free and independent. We are haunted, too, as an American people, I think, by that old aphorism that says: Strong leaders can make for a weak people. We want our presidents to be powerful when this is needed, but we know that if we make them too powerful, to do everything for us and on our behalf, they may become powerful enough to make us excessively dependent on them. And that was certainly not the intent of the framers here in Philadelphia.

Everyone agrees that trust between the branches is the key to making our system work, but trust cannot be legislated. You can try, but it's a difficult thing to legislate. It has to be earned and nurtured at regular intervals. The lesson there is that when it comes to electing presidents at presidential election time, look for those who are willing to engage in trust relationships with their cabinet, the Congress, the other systems of government, the other levels of government, and the American people, who have the capacity internally to be able to regularly earn and nurture and develop and make that trust relationship bloom.

A Wisely Designed System

The challenge that confronted the framers is not only still with us but is exacerbated by the coming of the welfare state, by the warfare state, by the regulatory state, and by all the huge apparatuses of government and world affairs and nuclear weapons.

How to reconcile the need for executive energy and lock in prerogative with republican liberty—that's still the demand; that's still the challenge for us. Nearly all of us would agree, although not exactly in the same ways perhaps, that we need Hamiltonian energy in the executive branch of government to make our Madisonian system of checks and balances work in such a way as to achieve those cherished Jeffersonian ends of liberty, freedom, and social justice. But how much of that Hamiltonian energy do we need? Who draws the line?

One of our problems is that presidents have no peers. A member of the Supreme Court who has some silly ideas is hooted down by seven or eight colleagues. A member of the U.S. Senate can propound a stupid and ill conceived idea. It is likely to be ignored or rejected by the majority of his or her peer group. Yet there is no safeguard in a peer group for American presidents. Constitutionalism with the separation of powers means an often slow-moving and sometimes inefficient system. It means a system that is often better designed to prevent leadership than to facilitate it. It means a many-splendored but also a many-splintered system, with dispersed powers, multiple veto possibilities. It means a system that often can be described as better designed to morselize public policy than to permit it to have a sweeping, coherent, and clear character. It is a system that plainly invites contention, diversion, debate, delay, and, I would add, healthy political conflict. Gridlock, stalemate, paralysis—yes, all of those in some respect are encouraged by the system that the framers invented here 200 years ago. If those things exist—stalemate and frustration and deadlock—it is because in many respects the framers wisely designed it that way, for they wanted to protect against several possibilities. One was the tyranny and lawlessness of majorities, and another was the potential evolution of a despotic tyrant in the executive branch.

Therefore, they went to great length, with federalism and all kinds of things, to check the possibility of an overly strong president. It is sometimes said that the intentions of the framers are now irrelevant. Yet they were painfully aware of what could happen under a George III or some rebirth of that kind of possibility. That's why they decided that before the nation would make major decisions on economic policy or war policy or other matters, it was important for the Congress to be involved. That's been turned on its head today, and the so-called Fawn Hall theory, or constitutional school of thought, says that not only presidents but presidential aides and staff members and secretaries apparently can rise above the laws and rise above the Constitution when they think it's in the best interest of the president or themselves. I would suggest that that's not what the framers really wanted.

I would just close with a few last thoughts and urge you to read the Iran-contra hearings that were summarized in the reports both by the majority, which is mostly Democrats and some senators from the Republican party, and the minority report too. There are wonderful documents for learning in the Iran-contra hearing report. I quote one line or two from the majority report: "The theory of the Constitution is that policies formed through consultation and the democratic process are better and wiser than those formed without it."

What an Effective President Does

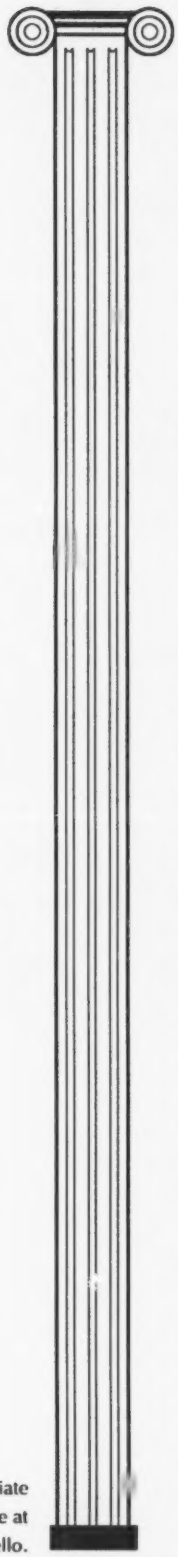
The Constitution divided foreign policy making between Congress and the president. That division and the necessity for sharing are fundamental, in my view, to making the formation of policies work, even as we go into the third century of this experiment. An effective president will fashion policies in consultation with the Congress and, wherever possible, with the American people. An effective president will refrain from disinformation campaigns and undeclared foreign policy operations. An effective president will insure that her or his staff obey the laws and understand the Constitution from day one. Similarly, a president who wants to cut the deficit will work to do so rather than relentlessly divert attention from that task by calling for item vetoes or balance in budget constitutional amendments, which I think are red herrings and diversionary from the task that needs to be done. An effective president will have ample time, I believe also, in an eight-year period to achieve what needs to be done and need not whine for the repeal of the Twenty-Second Amendment, again an unnecessary diversion from the real task of leadership. An effective president will always place the Constitution and the country's interest ahead of her or his personal or partisan, narrow interests. And an effective president recognizes that new initiatives in leadership will win approval only when the president clarifies objectives, educates and persuades, and makes a compelling and forceful case for the policy he or she favors. It's tough to be president, no doubt about it. But we ask that those presidents, when they really want to bring about shifts of policy, educate, persuade, and make their case and not do so surreptitiously, capriciously, and secretively.

Conclusion: Requirements of Good Citizenship

Let me conclude by sharing just a few phrases from America's legendary poet of democracy, Walt Whitman. I think they bear on the task that all three of us will speak

about. "There is no week nor hour," wrote Whitman, "when tyranny may not enter upon this country if the people lose their supreme confidence in themselves and lose their roughness and spirit of defiance. Tyranny may always enter. There is no charm, no bar against it. The only bar against it is a large, resolute breed of citizens."

We need a strong presidency, but even more important, we need a strong Congress, a strong press, a strong people, a strong court system. This country will be strong, not if we look for an individual leader to lead us, the almost chosen people, in Lincoln's phrase, to the almost promised land, but rather if we develop many citizen leaders—people like you and me who teach and who write and who work with community groups and educational groups, and civic forums. Our nation will not be led in the proper direction, it will not be saved and not be helped out if we are looking for savior figures larger than life—Mount Rushmore figures, if you will—who will come to lead us. Our nation is going to make progress only when we have done our job and educated so many citizen leaders in the communities, in the states, in the professions, in the public and private sectors, that presidents will not have to be looked to with any regularity for leadership; they will just be part and parcel of a whole team of people and a nation of leaders who are talking about things and talking about who we are, where we are, where we want to go. It's that kind of ideal, I think, that educational leaders such as yourselves should take away from the study of the American presidency.



The Constitution and the Conduct of Foreign Affairs

David G. Adler

What I want to talk to you about concerns one of the most critical areas in all of constitutional law. It's an area that Americans aren't very familiar with. That subject is the way the Constitution governs the conduct of foreign policy. If we think about how the Constitution governs the conduct of American foreign policy, we have to recognize at the outset that a great gulf has developed in recent years between the principles of the Constitution and the way the government actually behaves.

The Myth of the President as "Zeus"

As Americans continue to celebrate the bicentennial of the Constitution, they may be persuaded by the recent Iran-contra affair to examine what is perhaps the most dangerous and pervasive of all constitutional myths, the myth that in foreign affairs, as Professor Gerhard Casper has so colorfully described it, the president is Zeus. Like the greatest of the Olympian gods whose power was supreme and whose behavior was beyond control, the president, it is said, may do whatever he wishes in the realm of foreign policy. The press and the public have been poisoned by this myth.

If you were to shine a lamp on that constitutional argument, it would go something like this. The framers gave the president a unique role in American foreign affairs. As the sole organ of American foreign policy, the president alone is responsible for our national security and our national defense. Thus congressional action in this area is invidious. Indeed, any attempt to legislate in this realm constitutes a violation of the separation of powers doctrine and an encroachment upon the constitutional power of the president. To fulfill this great function, the president is vested with certain inherent powers and all of the executive power of the nation. Moreover, he is commander-in-chief of the armed forces, a post that carries with it the authority to do anything, anywhere, anytime that can be done with military force, including the initiation of war. Apparently, it also includes the authority to violate the law.

What the Framers Had in Mind

This mythical conception of presidential power bears no resemblance whatsoever to the design of the framers, nor does it find support in the text of the Constitution. Indeed, it is wholly without legal foundation. The framers, as we shall see, envisioned the conduct of American foreign policy as a partnership between the president and the Congress. Surprisingly, at least from the vantage point of the twentieth century, Congress—not the President, but *Congress*—was intended to play the dominant role.

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The most important of all foreign affairs powers is the power to initiate war. By Article I, section 8 of the Constitution, which provides that Congress shall have the power to declare war, the framers made clear their intention to vest solely and exclusively all the offensive authority of the nation in that body. The aim of the framers, as James Wilson said—and James Wilson was second in importance only to James Madison at the Constitutional Convention—"the system was designed so that one man will not hurry us into war." The framers opted for collective decision making in the general realm of foreign policy, and particularly with respect to the war power. Even at that time, two hundred years ago, they well knew the great destruction that war could bring—that a society could be torn apart, that a nation could be rent. With that in mind, they preferred that before the United States made war on any other nation, there would be discussion and deliberation by the peoples' representatives. That's Congress.

The framers, to a man, agreed the president had no authority whatever to wage war unless Congress first authorized it. It had been fairly typical practice prior to the Constitutional Convention for nations to openly and formally declare war—that is, name a public enemy, name an adversary. In our case it would mean naming an adversary, an enemy of the American people. Without a formal declaration of war, Americans would not know who their enemy might be. It was important then that the Congress identify an enemy of the American people, although a declaration of war was not necessary—it was necessary merely that Congress first authorize it. I might say that in this area there was no dissent whatever.

Indeed, you can search the records of the nineteenth century and you won't find a dissenting view. It's pretty incredible. Search the records of the nineteenth century, and you won't find a president ever who claimed the power to initiate war. Moreover, the Supreme Court on a number of occasions early in our history—in 1800, 1801, 1803, 1804, and 1806—held that the power to take this nation into war is vested solely and exclusively in Congress. The president was given only the authority to "repel an invasion of the United States." The historical evidence on this point is overwhelming.

The Commander-in-Chief Clause

Despite that fact, despite a great mass of evidence to the effect that only the Congress could take this nation into war, there are some commentators, and there have been numerous presidents beginning with Harry Truman, who have claimed that the president has constitutional power to take this nation into war. They place their principal reliance on the commander-in-chief clause of Article II.

What can be said about the commander-in-chief clause? First of all, let's be clear. The framers did not coin this term, nor did they pluck it from the void. The term *commander-in-chief*, that title, had been introduced in England in 1639, and that title was conferred upon the person who held the highest ranking position in the military hierarchy. As practice developed, there were numerous commanders-in-chief in England. The highest ranking military official in any theater of battle was given that title, but in all events that commander-in-chief was accountable to a political superior, namely Parliament. That practice of entitling the officer at the apex of the military hierarchy was transplanted to America, and in 1775 the Continental Congress named George Washington the commander-in-chief of the militia. But at that time it instructed Washington to carefully observe all the instructions and directions that Congress would give to him.

With that background in mind, the framers made the president of the United States commander-in-chief of the army and the navy, when called into service. In the Constitutional Convention, Alexander Hamilton, a great extoller of a strong presidency, said that, the president shall have command of the armed forces "when [war is] authorized or begun." War could be started in one of two ways: (1) when it was authorized by Congress, and (2) when the United States was under attack. In *The Federalist, No. 69*, Hamilton very carefully distinguished the authority to commence war, which the king of England held, from the authority that the president has, which is only to command the troops placed at his disposal once Congress has initiated or authorized war. In England, said Hamilton, the king may commence war at his pleasure, but in America that power belongs to Congress. The president, he said, is only first admiral of the navy, first general of the military or of the army. And again, the president doesn't have an army to command unless Congress places one at his disposal.

There was no dissent, mind you, from this interpretation of the commander-in-chief clause during the founding period or beyond.

Moreover, the Supreme Court never has held that the commander-in-chief clause is a source of war-making authority for the president. Never. The commander-in-chief clause, then, does not supplant the war clause, which gives the power to initiate war to Congress. As explained by James Wilson, the framers withheld the power to commence war from the president and granted it to Congress. This should not surprise us at all because the framers were very familiar with the destructive capacity of war, and before they put the very fate of the nation on the line, they wanted discussion and deliberation. Should we go to war? Let's discuss it and debate it first. However, in the event that the United States is attacked, of course, there's no time for discussion or deliberation, and in that event the president was given the power "to repel an invasion."

So no judicial precedents support the claim that the commander-in-chief clause authorizes the president to undertake acts of war.

"Executive Precedents"

So the myth makers have purported to rely on executive precedents. According to this line of reasoning, every presidential act of war becomes a precedent that serves to legitimize and authorize future presidential acts of war. For example, President Truman took the United States into the Korean War without congressional authorization, and since then we have seen numerous acts of war carried out on presidential authority alone in such places as Vietnam, Cambodia, Libya, the Dominican Republic, and Grenada. These executive precedents, of course, are nothing more than usurpations of the congressional power to authorize war. These executive precedents can be said to establish a presidential war-making power only if it can be said that the repetition of a crime legalizes a crime. On that reasoning, if you steal hubcaps frequently enough, the theft of hubcaps becomes legal.

The Executive Power Clause

Another alleged source of executive war-making and foreign policy powers is the executive power clause of the Constitution. This is altogether improbable. The Court, the Supreme Court, has never held that the executive power clause was a source of foreign affairs powers, nor, if you examine the debates inside the Constitutional Convention, can you derive either general foreign policy powers or particularly a war-making authority from the executive power clause. Why not? Because early on, after the Virginia Plan had provided for a national executive that would enjoy the executive authority vested in Congress by the Articles of Confederation, some framers were alarmed by the possibility that the president would thus inherit the congressional power over war and peace. But James Wilson immediately told his colleagues that writers on the law of nations (meaning international law) uniformly regard war-making as a legislative power. James Madison quickly echoed those remarks, and the convention's fears were allayed. It was understood that war-making is a legislative power and thus beyond the ambit of executive power.

So, therefore, when presidents today claim the executive power clause as authority to make war, they're ignoring the fact that in the Constitutional Convention that idea was considered and rejected. To the framers the executive power clause was very narrowly construed: it amounted to nothing more, as James Wilson said, than the power to enforce the laws and to provide and to make appointments to offices as provided by law. A very narrow function.

President as "Sole Organ" of Foreign Policy

Invariably, advocates of presidential control of American foreign policy turned to another argument. They claim that the president is the "sole" organ of American foreign policy. Sometimes this authority is thought of, as Ronald Reagan recently described it when he invaded the pygmy state of Grenada, as the president's constitutional authority to make foreign policy. There's no such grant to be found in the Constitution.

Take a look at Article II of the Constitution. Take a close look at it. Only two powers, just two, are granted to the president. ***Just two.*** One is the commander-in-chief clause, but as we've already seen the president exercises that role by and under the authority of Congress. The second is his authority to receive ambassadors. The framers, including Madison and Hamilton and later Jefferson, all agreed that the reception power—now known as the recognition power—was merely a clerk-like function devoid of discretion to refuse to receive ambassadors, which, merely for convenience sake was vested in the President. After all it's a lot easier for the president to shake hands with a foreign dignitary than it would be in our day to trot out 535 people in Congress, have them stand on the steps, and shake hands. Those are the only two powers granted to the president by Article II. The other powers he shares.

Moreover, what is the "sole organ" business derived from? What's the origin? Probably you've all heard this phrase, ***the sole organ of American foreign policy.*** If you're familiar with a 1936 Supreme Court case, the ***United States v. Curtiss Wright,*** that's where the term comes from. Well, at least its application to current affairs comes from that decision, authored by George Sutherland, the only Supreme Court justice we've ever had from Utah. We're fortunate for that, I think. In that case, Sutherland said the president is "the sole organ of American foreign policy." Where did he get that phrase? He appropriated it from a speech given on the floor of the House of Representatives in 1800 by then Representative John Marshall, later to become chief justice. In the course of his speech Marshall said the president is "the sole organ of American foreign policy," but he meant nothing more than to indicate that he is the mouthpiece to the world. He did not at all intend that by naming the president the sole organ he was vesting the president with a substantive policy-making function. There's a huge difference between making policy and telling the world what our policy is, and Marshall wasn't the first to have said that. In 1793 on different occasions both Jefferson and Madison said the same thing. It was well accepted; until Justice Sutherland breathed new life into that phrase in 1936, nobody had ever considered that the president's communicative function was anything more.

Scholars have justly savaged the *Curtiss Wright* decision. In that decision, George Sutherland said that the president derives his power in foreign affairs from some source other than the Constitution—that he doesn't derive his power from the Constitution. Somehow—and

this is his fanciful view of Anglo-American legal history—somehow the president received that power directly from the king of England. I won't bore you with the details, but that was his statement. Well as it happens, the Supreme Court has routinely dismissed that statement as dictum.

Moreover, it has long been held, as Justice Black said in 1957 in the case called *Reid v. Covert*—and he was echoing John Marshall who had held in 1819 in the famous case of *McCulloch v. Maryland* that "the government is a creature of the Constitution." It has only that power granted to it by the Constitution—no other powers. Well, as my mentor Francis Wormuth said of *Curtiss Wright*, the dictum in *Curtiss Wright* has "neither paternity nor progeny."

Closely linked to Sutherland's confusion is the argument that the president has a prerogative power to do whatever he perceives to be in the nation's interest, whether or not the action is lawful. Admired by many both in and out of government, this doctrine, which has its origins in the royal prerogative of the king of England, culminates in President Richard Nixon's infamous statement that the president is above the law. Contrary to what those great constitutional scholars Fawn Hall and Oliver North have said—and it's always nice when you can steal a line from the previous speaker—the president may not break the law. That is such nonsense. The most that can be said for the prerogative power is this. It is a claim to extra-Constitutional power. Just an assertion. Any action based on that claim is by definition unconstitutional.

If you consider that a president might decide to take this nation into war in obvious violation of the Constitution, if he feels that the survival of the nation is on the line, what he ought to do is take the action and then, based on a long tradition, go before Congress, humble himself, explain his actions, and ask for immunity and exoneration in the form of retroactive legislation. Congress has done this. Jefferson and Lincoln came to Congress and asked to be pardoned, in effect. If Congress doesn't buy the reasoning, Congress impeaches the president.

The significance of this request for immunity from Congress is that the president is not the judge of his own actions. Congress is. That way we maintain some semblance of constitutional government. Contrary to popular thought, then, the president is not Zeus in foreign affairs.

A Partnership Between the President and the Senate

For their part the framers considered that the conduct of foreign policy would be a partnership between the president and the Congress, with the latter designated the senior partner.

To put it more precisely, the framers assumed that most of American foreign policy would be conducted by the treaty-making partners, the president and the Senate. This is the mechanism that would effectuate American foreign relations. Alexander Hamilton—that great extoller of a strong presidency—echoed the words of his fellow framers when he asserted at the New York State ratifying convention that the Senate together with the president are to manage all our concerns with foreign nations. The union of those two branches in the conduct of foreign affairs was essential in the minds of the framers because as Hamilton said in *The Federalist, No. 75*, the history of human conduct does not warrant placing such awesome authority, the conduct of foreign policy, in the hands of one person. As Hamilton explained, the framers could not bring themselves to trust the president to make foreign policy by himself. Instead they opted for a shared power.

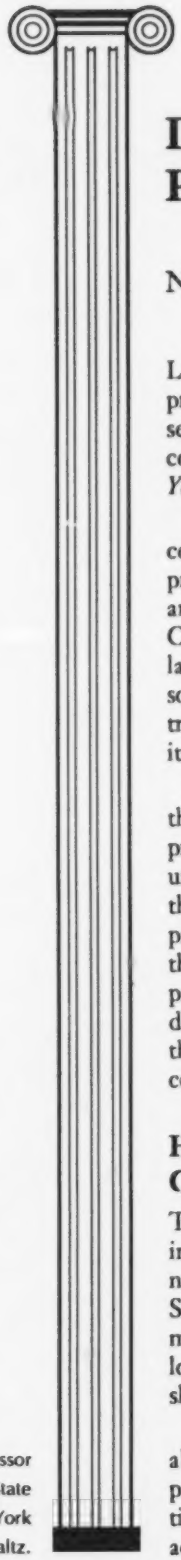
This decision to create a treaty-making power which Madison and Hamilton called the fourth branch of government—or, in the words of Locke and Montesquieu, the federative branch of government charged with the responsibility to conduct foreign affairs—really represents one of those many checking and balancing devices in our Constitution. The president and the Senate could check each other. Cooperation, partnership was the theme here. The framers of the Constitution adopted this cooperative arrangement because they well knew that treaties could greatly affect their social, economic, political, financial, and security interests. The addition of the president as a partner in the treaty-making power came very late, only in the last few days, and then only at the behest of Madison, who believed there ought to be a check on the Senate—further evidence, then, that the Senate was considered the leading play maker here. The president had only secondary importance.

So in the end the framers granted the bulk of foreign affairs powers to Congress. Everything—ranging from the regulation of foreign commerce, all our foreign trade, to the ultimate foreign affairs power, making war, and virtually everything in between—was granted to Congress. The president's constitutional powers over foreign affairs paled by comparison.

Of course, it would be foolish in this day and age to deny that the president controls foreign policy, because he most surely does. But as I said at the outset, this does not represent the scheme envisioned by the framers. It's sometimes observed that the intentions of the framers are irrelevant and outdated, but before we too readily acquiesce in this verdict, let us consider the values underlying their decision to vest in Congress, and not the president, the power to take this nation into war. Painfully aware of the horror and destructive capacity of war, they decided that they wanted collective decision making. That was two hundred years ago—before the advent of nuclear weapons. As things stand today, of course, the president

has been exercising that war-making power. With that power he has the authority to initiate nuclear war. With that power he has the power literally to incinerate the planet, by himself, without any discussion with Congress.

I would submit that at least in this one area the framers' decision to vest the war power in Congress is even more relevant today, even more compelling today than it was two hundred years ago.



Does the Constitution Matter to the Presidency Today?

Nancy Kassop

Let me pose a broad question at the outset, and that is, with reference to the presidency as an institution, Does the Constitution matter today? That may seem to be a rhetorical question at first, but it is one that raises for inquiry a compelling notion and one that was examined in a recent article in the *New York Times*.

That article actually concerned Congress rather than the presidency, and it considered whether members of Congress were free or even obliged to interpret the Constitution in the course of their work as legislators. Essentially the article asked, What are members of Congress supposed to do about the Constitution? Should they feel an obligation to interpret it as they write their laws, or is interpretation a job left solely for judges? And from the viewpoint of some members, Why should they take the responsibility upon themselves of trying to interpret the meaning of the document when the Supreme Court itself splits five to four on questions of constitutionality?

Equally, we could ask whether it is either appropriate or even necessary for the president to consider the constitutionality of any proposed action before he presents it. Our system operates under the assumption that presidents must unquestionably be sensitive to and aware of the limits placed on that power by the Constitution. But a quick glance at the Constitution's provision on the presidency will make it clear that those limitations are not easily definable and thus are left to individual interpretation. What all of this means is that each president interprets those powers anew, either choosing to follow the precedents that were established by others or using the opportunities that present themselves to stamp on the presidency a new understanding of the scope and content of presidential powers.

How Do Presidents Weigh Policy Goals and Constitutional Authority?

This inquiry raises some intriguing questions. For example, which comes first in the president's mind, the policy goals he wishes to achieve and the actions he needs to take in order to reach that goal, or the constitutional authority to act? Second, are these two considerations, either in theory or in practice, necessarily mutually exclusive? Third, does it really matter which one he considers first as long as he eventually recognizes the need to justify both? And finally, why should we care about these questions at all?

Let's start by answering the last question first. Of course, we should care about whether or not the president considers the constitutionality of any proposed action. A system of government based on the concept of constitutionally limited powers will quickly lose its claim of legitimacy if its political actors may act without regard for its provisions.

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As self-evident as that statement may be, in theory, it overlooks the effect, in practice, of continual constitutional interpretation by presidents most often geared toward justifying a particular policy end. Nothing prevents a president from stretching or expansively interpreting his powers, and thus the great legacy of the imperial presidency is indeed this very expansion of presidential power through continual interpretation. But that expansion did not start or end with the imperial presidency, and it can still be seen in the questions that dominate the arena of competing claims of constitutional power today. That competition arises out of an energetic president who is willing, much like a young child, to test the limits of the authority provided to see just how far one can go before getting pulled back into line.

Second, there may well be good reason to suggest that the order in which a president considers policy objectives or constitutional authority may indeed make a difference. If the boundaries of constitutional authority are understood at the outset, policy objectives and actions will be thus restricted to conform to those limits.

This scenario assumes, obviously, that there are identifiable limits to presidential power—a questionable assumption in itself. On the other hand, a president who maintains a flexible and open-ended understanding of his power still leaves himself ample room to maneuver, even under this approach. If policy goals are determined first, there is the practical need to backward map and find a textual justification for the proposed action, an activity that itself may create the need for a certain amount of creative constitutional interpretation. History has shown that where presidents have operated in this way in order to respond to emergencies, the public has overwhelmingly supported them, but public support was not necessarily forthcoming when such actions were taken in the absence of urgency.

Third, decisions of policy preference and constitutional authority should not be mutually exclusive for the very simple reason that the Constitution was written for the purpose of providing the structure and process through which political decisions are to be made and implemented. Therefore, unless and until there is reason to alter either the structure or the process, it is necessary to insure that political decisions are produced with fidelity to the requirements of the system that conceived them. To allow otherwise would undermine the notion of constitutional democracy.

Finally, moving from the normative to the empirical dimension, there is visible evidence from a whole series of relatively recent and some current controversies that presidents clearly do begin with policy objectives and reach the constitutional issues only secondarily, if not at some times with outright disregard for the whole notion of constitutional limits as operationalized through separation of powers, and checks and balances.

New Theory of "The Arrogant Presidency"

Controversies over power boundaries between the branches are far from novel and are liberally sprinkled throughout history. What distinguishes these current controversies from past ones, however, is the development of an underlying affirmative theory of presidential power, a theory that ties together many issues in a way that presents a direct challenge to the whole notion of constitutionally limited powers. We might label this theory "the arrogant presidency," for it stems from a presumptuous possessiveness of presidential power (the "four Ps" we might call them). It boldly confronts the competition for power between the president and the other two branches on the main grounds of one branch's interference with another's exercise of power.

To illustrate these claims of interbranch interference where presidents have expansively (and, questionably, I might add) interpreted their constitutionally allocated powers for the purpose of maximizing their policy objectives, I shall examine two issues: first, the continuing debate over the power to employ military force in hostilities, and second, the claim of executive privilege asserted by President Nixon in the Watergate tapes case.

The connecting thread between these two issues and many others, as well, is an assertion by the president that either Congress or the court has encroached upon exclusive, but undefined, presidential prerogatives, and that the president consequently has the right to reclaim those prerogatives for himself. Once again, the question of constitutional interpretation raises its head—this time for the purpose of determining how far one branch can go before it bumps up against another branch's powers and impermissibly invades them.

Power to Employ Military Force

The continuing conflict between the president and Congress over the scope of authority possessed by each regarding the power to commit military troops to hostility is one that grows out of conflicting assertions of power. The president presumes from his status as commander-in-chief and as sole representative of the nation in foreign affairs an inherent and superior authority to make decisions regarding war and peace. Congress, on the other hand, maintains that the provision in Article I delegates exclusively to Congress the power to declare war.

The existence of these two independent sources of power over the privilege to direct the most delicate aspects of foreign policy has been appropriately called by Edward Corwin, one of the most respected scholars on the presidency, "an invitation to struggle." That power struggle begins with, and continues to unfold to this day out of the whole nature of constitutionalism or, more clearly, the notion of a government of limited powers. It was precisely for this reason that the president was not entrusted by the framers with the power to bring the

nation into war. That power was instead placed into the hands of a deliberative, representative body. But it soon became evident that there were certain circumstances *short of war* for which presidents could constitutionally order the use of force on their own authority, thus providing the proverbial crack in the door that could ultimately undermine the Constitution's design and intentions in its assigning of the power to declare war only to Congress. By 1973, Congress mustered the political will to respond to the accumulation of expansive assertions of presidential authority in war-making, and passed the War Powers Act. What that much-maligned and misunderstood piece of legislation actually does is two things. First, it clarifies the powers of each branch, giving concrete, contemporary meaning to the original constitutional understanding, and second, it provides for the orderly mechanism for the implementation of these powers. Its purpose is commendable. Its mode of operation may need some tinkering. But it does seem to offer the two features most conspicuous in their absence until 1973 which address the most serious limitations to an effective and valid functioning of the war powers. It imposes a sense of structure on the process of war-making, and it incorporates the provision for a registering of public support necessary for legitimacy. This is no small accomplishment, and herein may lie the beginnings of an answer to that age-old invitation to struggle.

However, every president, from Nixon who vetoed the War Powers Act, to Reagan who refuses to obey it and abide by its provisions, has called the act an impermissible intrusion into presidential prerogatives in the area of foreign and military policy.

Currently, 110 members of Congress have asked the federal district court to rule in the case of *Lowry v. Reagan* on whether President Reagan's willful failure to report to Congress the committing of U.S. naval forces in the Persian Gulf, an area that objectively qualifies as one where "hostilities may be imminent," constitutes executive branch subversion of, or interference with, a duly enacted law of Congress. We see here an example of a president who, in pursuance of a policy objective, chooses to interpret the constitutional authority of his office in a way that is at odds with the current law. The result is a standoff, with the president claiming congressional interference into presidential powers, and Congress claiming presidential subversion of a law of Congress. It remains to be seen whether the courts will take up the challenge and resolve the standoff or whether they will duck the issue entirely as they have so often in the past when Congress has charged the president with subverting the will of the legislature.

Executive Privilege and the Watergate Tapes Case

In turning to the second issue, President Nixon's claim of executive privilege in the Watergate tapes case of 1974 is the quintessential example of an expansive interpretation of presidential power which conflicted with the constitutional requirements of another branch. Here the president's generalized assertion of an absolute unqualified privilege of confidentiality interfered with the judicial branch's responsibility to insure that all relevant evidence would be available to the defendants in a criminal proceeding. Once again a president interpreted the scope of executive power broadly enough to embrace his policy goal, which in this case amounted to unlimited confidentiality of communication between executive branch officials.

The separation of power conflict here grew out of the president's defiance, not of Congress, but of a federal court order requiring the president to produce documents needed as evidence in a criminal trial. Nixon maintained, unsuccessfully, that a president should be the judge of the extent of his own powers. But this position was solidly rebuked by a unanimous Supreme Court, which reaffirmed the words of Chief Justice John Marshall that "it is emphatically the province and duty of the judicial department to say what the law is."

Although the case is best known for its short-term significance of requiring President Nixon to turn over the tapes to the Watergate special prosecutor Leon Jaworski, its long-term legacy is far more meaningful and provocative in terms of its ultimate effect on constitutional authority. The fact that the Supreme Court's decision actually recognized for the first time the constitutionality of a president's assertion of executive privilege under certain limited circumstances, mainly for the purpose of maintaining confidentiality of military and diplomatic secrets, provided this claim with a foundation of legitimacy and, furthermore, supported the notion that presidents *do* possess certain inherent prerogatives not specifically enumerated but rather rooted in the nature of separation of powers itself. This is a decision of extraordinary importance and impact, for after having recognized separation of powers as an independent source of constitutional authority, the president is thus provided with a firm basis for further claims of undefined constitutional powers. The Supreme Court and the country may have gotten far more than it bargained for in this fateful decision.

The Iran-Contra Affair and Other Tests of Presidential Power over Foreign Policy

Another controversy that presents comparable inter-branch separation of powers issues is the Iran-contra affair and the whole reason behind its origin. This was primarily due to a feeling on the part of some executive branch foreign policy-making officials that Congress, in passing such legislation as the Boland Amendment and the Intelligence Oversight Act, had impermissibly, unconstitutionally, and with a lack of political wisdom interfered with and restricted broad presidential prerogatives to conduct foreign policy.

Additional conflicts between the president and Congress include the recent tug of war between the president and the Senate over the power to interpret treaties as illustrated by the disagreements and the interpretation of the 1972 ABM Treaty and the more recent efforts of the Senate to authoritatively assert for the future its constitutional powers in this area.

Presidential Statements upon Signing Bills

Finally, a relatively new issue concerns the increasing likelihood of a confrontation between a president and Congress over the growing phenomenon of presidential "signing statements." President Reagan has used the opportunities when signing bills into law to make remarks about how he believes these laws should be interpreted and implemented by the executive branch.

Attorney General Meese has strongly urged that these statements be included in the legislative history of each law as reported in *U.S. Code Congressional and Administrative News*, and both the attorney general and the president have suggested that judges should rely on them when such laws are interpreted by the courts. This raises the inevitable question: If courts are presented with evidence of "presidential intent" as articulated in these signing statements, how then is this intent to be reconciled with the respect traditionally accorded by the courts to "legislative intent." Does the president have the right to reinterpret a law passed by Congress and to reinterpret it in such a way that it is at odds with Congress's stated intent?

Just two months ago, this very issue received its first airing in the federal courts. A case arose out of public statements made by President Reagan when he signed into law in 1984 the Competition in Contracting Act while declaring that a key section of that law violated the principle of separation of powers. The administration ultimately refused to enforce a section of the law and was taken to court by a military contractor. A three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled that the disputed provision was constitutional and ordered the government to pay the contractor's attorneys' fees. More importantly, however, the judges said that the president's assertion of authority to declare a law unconstitutional and to then disregard the law was "utterly at odds with the texture and plain language of the Constitution."

What can we conclude from all of this? What truly is the proper place and degree of influence that should be attributed to the Constitution on a daily governing basis? Is it time to send an incoming president into the White House armed with constitutional law case books instead of "how-to" manuals on campaign fund raising? Or should we suggest that the president follow the example set by the chair of the House subcommittee on courts who now requires that any report from his subcommittee on any bill that raises a substantial constitutional question be accompanied by a "constitutional impact statement?"

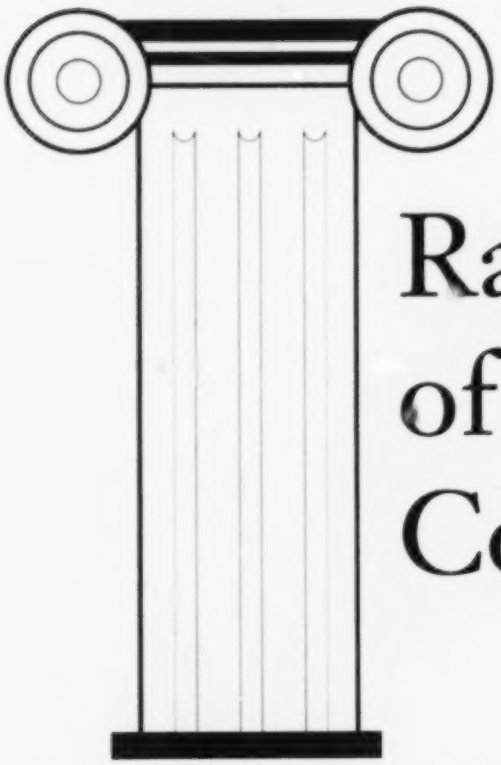
Conclusion: Does it Matter?

Once again we return to the original questions posed at the very beginning of this examination of presidential power within the confines of constitutional government: Does the Constitution matter today? More specifically, can we determine whether presidents are attentive to and respectful of the constitutional limits on their power? What does the evidence show? I think quite clearly, from the examples offered, we could conclude that the Constitution matters very much to presidents and never more so than when they can use it to their own advantage.

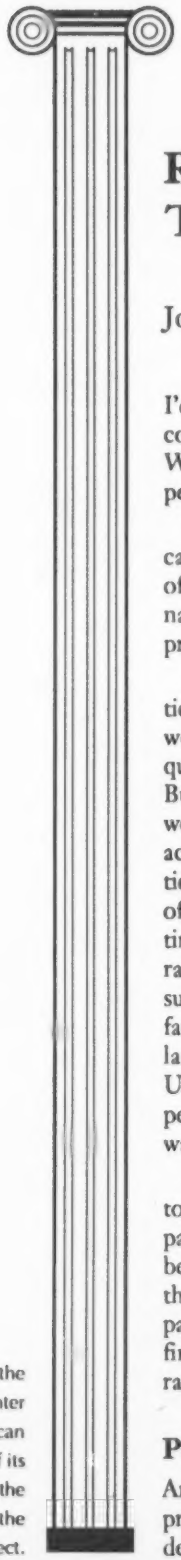
To look at this conclusion from the opposite perspective, if the Constitution did *not* matter, why then would the president and Congress and the courts be so protective and possessive of their powers? If it mattered little, there would be no incentive to understand it or to use it. Quite the contrary, the incentive is to jealously guard and protect one's constitutional power against incursions by other branches, and it is this protectiveness and possessiveness of power that seem to characterize the attitude of the presidency, even more so than that of Congress or the courts.

Is this attitude, then, the basis for an "arrogant presidency," as suggested earlier? If we consider the issues offered as examples of expansive interpretation of presidential power, where concern for policy goals really did take priority in the president's mind over constitutional niceties, we might well conclude that the nature of the presidency as an institution is rather self-centered and greedy. Given that nature, it is not difficult to understand how such an institution might view its interpretations as the only ones that mattered.

Of course, we want and expect presidents to interpret the Constitution in the course of their performance of their assigned constitutional duties, but the whole notion of a government guided by a respect for the rule of law requires that one's own interpretation of one's own authority may not be final. If the concept of a government of limited powers means anything at all, it means that those interpretations must be subject to the checking and balancing by other branches. The choice may be between extraordinary presidential power versus ordinary constitutional limits. To sacrifice those restraints risks the greater loss of the security of limited government altogether.



Ratification of the Constitution



Ratifying the Constitution: The State Context

John P. Kaminski

I'd like to discuss some of the basic premises that help us understand the constitutional ratification process that took place between 1787 and 1790. Without this understanding, it's very difficult to fully appreciate what happened in the states.

The ratification process was, in fact, 13 different processes with 13 different casts of characters. To fully understand ratification, you must understand each of these. The states ratified individually and so this is not necessarily a national story. There was a national debate going on, but it was much more prominently state debates.

Now, let's look at the United States in 1787. First, let's look at the population. The most often asked questions when it comes to ratification are, "Who were the Antifederalists? Who were the Federalists?" These are very easy questions to ask, and seemingly very easy questions for historians to answer. But more often than not, they're not entirely correct when they answer. I would say that 90 percent of Americans in 1787 were farmers. Now, if you accept the premise that the country was pretty well divided over the Constitution, that means farmers were on both sides. They worked all different kinds of farms. In New England, farms were basically smaller, often worked by part-time farmers, clergy, lawyers, and artisans. In the middle states you had a wide range of farmers, while in the South you had plantation owners and small subsistence farmers. Basically, the America of 1787 was primarily made up of farmers. There were, of course, cities at the time, Philadelphia being the largest with a population of 40,000. Just imagine—the largest city in the United States having a population of only 40,000. New York had about 25,000 people; Boston only 15,000 and after that it really drops off. Basically, America was largely a rural country.

Communication was not always easy among the states. Americans were tied together by rivers, by the coastline, and also by often impassible roads. Newspapers also tied Americans together. About 125 newspapers were published between 1787 and 1791, when the Bill of Rights was adopted. The debate over the Constitution was primarily a debate that took place in newspapers, in pamphlets, and in broadsides. This is where the Constitution was discussed, first and foremost even before the Constitution was considered in the state ratifying conventions.

Public Opinion Under the Articles of Confederation

America in 1787 was really a loose confederation of the states. One of the key provisions of the Articles of Confederation that figured in the ratification debate, Article 2, stated, "the states were sovereign and independent and

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Congress only had those powers that were specifically delegated to it by the Articles." Congress with those delegated powers was supreme in its sphere, but it had no coercive power to enforce its supremacy. There was no separate executive, no separate judiciary. There was a President of Congress but he was more akin to a Speaker of the House of the Representatives. There was a judiciary under the Articles, but the only decision handed down by it—the Trent Decree in 1783—a dispute between Pennsylvania and Connecticut, was rejected by the states. Finally, unanimity was required to amend the Articles of Confederation. This certainly becomes an issue when we consider the circumstances regarding the debate over the ratification of the Constitution. Ever since 1781, Americans had tried to amend the Articles. The month before they were adopted, the first amendments to them were proposed. Over and over again, ten, eleven, or twelve states adopted those amendments but unanimity could not be achieved. It was clear that this would be a major factor in the ratification of the Constitution. Unanimity would not be obtainable, and therefore, could not be part of the ratification process.

In 1787, most Americans believed that the Articles of Confederation needed to be strengthened to give more power to the central government. It's difficult to say how much people believed the central government did indeed need to be strengthened. Some believed Congress needed a few extra powers—the power to tax (primarily the power to levy a tariff), power over troops, power to regulate commerce—but that's about all. Others believed that there was a danger in giving Congress too much power—power over the army, power over taxation, power of the purse—that to unite that kind of power in one body called for a separation of powers. If you look at Americans and their state constitutions in 1787, they could all pretty well agree on two common principles: 1) republicanism and 2) separation of powers. Those are two things that just about all Americans would accept, and that you could expect to be incorporated in their constitution.

The Debate Over the Constitution

Now the thing to consider about this constitution is that the debate over it was primarily a public debate that was part of a much larger whole. Americans had been debating for a quarter century about the nature of government and about how best to preserve liberty. Never before and never since has there been such a public debate. Perhaps the closest thing in our lifetime was the public debate that occurred over Vietnam, and that was only for about a ten-year period. During the ratification debates, however, many Americans were almost incessantly talking about government, posing such questions as "What is the best way to form a government? How can we protect our liberties?"

The debate began under the federalism of the British Empire and continued after independence was declared. While many saw the danger in losing the battle for independence and the consequences that might follow, the patriots also felt there was danger in being successful. What happened if they did win their independence? How would they form a long-lasting government? This was an ongoing debate, conducted primarily in the public press. Furthermore, I would say it was a debate over the Constitution. What I mean is that most Americans—a large percentage, perhaps 90 percent—favored the structure of government that the Constitution created. There was the feeling that we needed more power for the central government. We couldn't give it to the confederation congress, and, therefore, the debate that took place was over that constitution that was proposed, not over a mythical constitution, nor necessarily over a strengthened Articles of Confederation.

While most Americans accepted the Constitution as the basic starting point, if you had to single out one particular issue in the debate over the Constitution it would be amendments. I would say the reason that one word is so important is because no one in the entire nation fully endorsed the Constitution. From George Washington, who might have been its strongest supporter to Patrick Henry, who might have been its harshest critic, no one fully and unconditionally endorsed this Constitution. The question was how do we amend the Constitution, what amendments should be proposed, what should be the process in proposing those amendments, and when should those amendments be proposed and adopted? Those were the key questions that were debated.

The Eight Stages of Ratification

With that brief introduction, I'd like to review briefly what I would characterize as the eight stages of ratification. First, prior to the Constitutional Convention, from February 1787 until September 17, 1787, there was a movement outside the Convention to convince the American public that whatever the Convention might propose ought to be adopted. There were newspaper articles and letters that stated "we are trying to prepare the public mind to receive whatever the Constitutional Convention proposes." Henry Knots wrote to Lafayette and said, in effect, "we're trying to prepare the mind without any specification. It doesn't make any difference what the Constitutional Convention is going to propose. We want the public to be ready to receive it."

This was a considerable change from the previous six years and was due in large measure to the continual and unsuccessful attempts to amend the Articles of Confederation. Every time Congress proposed an amendment it had to be sold to the states. People had to be convinced that Congress wasn't grasping for more and more power—they had, after all, just fought a revolution for independence from the imperial despotism of London. They didn't want to establish another imperial govern-

ment in either New York City or Philadelphia, and were suspicious of central power and central authority.

What was different was the salesmanship that went on from February through September of 1787. The publishers of the *Lansingburg Northern Sentinel* in New York freely admitted in their newspaper that they felt it was their duty to prepare the mind of the public to receive the Constitution. Can you imagine publishers today saying that they're involved in this kind of political indoctrination?

The second step in the process was played out in the Constitutional Convention itself. The Convention had to decide how this Constitution was to be ratified, and here's what they did. They removed the state legislatures from the picture by deciding that ratification conventions elected in the states by the people would consider the Constitution. They avoided the unanimity obstacle by providing that nine states would be sufficient to ratify, and they provided that Congress need not approve the Constitution before it went into effect. These issues were extremely important and had to be addressed if the Constitution were to be ratified.

The third phase of the process was the initial flurry which started right here in Philadelphia when the Pennsylvania Assembly called their state ratifying convention. When the Convention began, the sergeant-of-arms and the assistant clerk of the House were unable to bring to Philadelphia two absent Antifederalist assemblymen who were needed to form a quorum in the Assembly. A mob was sent out, brought them to the Assembly, and, as a result, a quorum was officially formed for the first state ratifying convention. It discussed the Constitution for about three weeks and then ratified it.

Historians disagree on the significance of Pennsylvania's ratification. Some believe that if the example of Pennsylvania had been followed in other states it would have been a disaster. Pennsylvania Federalists ramrodded the Constitution through and alienated many people in the state. There was more opposition to the Constitution in Pennsylvania after ratification than in any other state, and, as a result, there were attempts to undue ratification, by petition and by threats of violence. In any event, Pennsylvania was really the first state to consider the Constitution. Delaware sort of snuck in. Its convention met for a very short time and was the first state to ratify and did so unanimously. New Jersey then followed Georgia—both unanimously—and Connecticut ratified by a two to one majority on January 9. This ended the initial flurry of state ratification.

The fourth phase of ratification was, in my judgment, the most critical. It occurred in Massachusetts, where a majority of Antifederalists were elected to the convention. After three weeks of debate, the Federalists realized they could not achieve ratification on a take-it or leave-it, no-amendments-allowed basis. This had been their approach up to this point. Acknowledging defeat, they decided to take a different, more subtle tack. They approached John Hancock, Governor of the Commonwealth and president of the Convention. Up to that point, Hancock had been unable to attend the Convention because of the gout. Hancock always seemed to have a flare-up of the gout whenever it was politically opportune, and this time was no exception. He had a regular entourage coming to visit him, telling him what was going on, but he could not attend because of his illness, or, as the Federalists liked to say, he could not attend until he decided which way the majority was going to vote. A Federalist committee approached him and said, "Look, we're at a stalemate here; we're going to lose. You know that we dislike you, we hate you, but we have a proposition for you. If you propose the amendments that we suggest as *recommendatory* amendments, not as conditional, we would ratify unconditionally, and would instruct our future representatives to Congress to seek the amendments that we suggest here. If you propose that in the Convention, we will support you for governor and we will not put up an opposition candidate. We will also support you for vice-president of the United States (you know, John, there is no guarantee that Virginia will ratify, and if she doesn't, George Washington will be ineligible to be president). Well, what do you say?"

The next day, a suddenly cured Hancock attended the convention and told the delegates, "Do I have a proposal for you!" In his haste, he didn't even bother to recopy the proposal and when it was seen by other delegates they realized that it wasn't his, but agreed nonetheless that this was the way that they ought to proceed. They voted to ratify, with the proposed amendments, by a nineteen-vote majority. This was the price that Massachusetts Federalists paid for ratification, a compromise that was acceptable to the Antifederalists as well.

The fifth phase represented the Antifederalists' general assault. This phase began in New York when its state ratifying convention was called in late January and early February of 1788. New York was seen by the public as being strongly Antifederalist, its legislature barely able to call a state convention. There was concern about what would happen when the convention met because of the strong Antifederalist sentiment and New York's importance to the nation. There were reports that North Carolina had ratified, reports later proven to be false. The New Hampshire convention met and it was felt that it would surely follow the lead of its big sister Massachusetts, but New Hampshire could not ratify and had to adjourn. Rather than risk defeat, the Federalists were able to gain an adjournment. Finally, toward the end of March, the Constitution was overwhelmingly defeated in a statewide referendum by a vote of almost 3,000 to 300. Clearly, the bandwagon had stopped and the Federalists were worried.

The next phase of ratification was the Federalists' revival. The Federalists were not about to sit back and let ratification slip through their hands. They concentrated their efforts on ratification in Maryland and it was the only state to ratify after Massachusetts that did not propose recommendatory amendments, and that's because the Federalists were not going to take any chances. They ramrodded the ratification through so aggressively that they even censored their own commission debates. Thomas Lloyd was hired by the Federalists to record the debates in the Maryland convention, but they would not allow him to publish those debates because it would not be politically expedient. Maryland ratified, followed by South Carolina, with New Hampshire following suit on June 21. This concluded the sixth phase of ratification.

The seventh phase involved the two large states, Virginia and New York. Despite the fact that the required nine states had ratified—New Hampshire was the ninth—without Virginia and New York no viable union was possible. You had a divided country, New England, the middle states and the deep south, divided by those two large states, making ratification absolutely imperative in at least one, if not both, of those states. I won't discuss these states here because my colleagues will discuss them later.

The last phase of ratification brought into the fold the two laggards, North Carolina and Rhode Island. North Carolina voted not to ratify in August 1788, but a year later, in November of 1789, a new convention did ratify. Rhode Island, after about fifteen failed attempts to call a state convention, did call one and ratified on May 29, 1790. Surrounding ratification efforts in these states was the proposal in Congress of the Bill of Rights, its adoption by Virginia on December 15, 1791, and the establishment of the Bill of Rights.

I would conclude by noting that it is difficult to say who won this battle over ratification. Superficially, we could say the Federalists won, but in reality most Antifederalists were seeking protection of rights, and when they got the Bill of Rights, they were, for the most part, satisfied. That's one reason why they were willing to accept the new government. It was the kind of government they wanted, and in fact, if you look at the United States from 1800 through 1865, it was the Antifederalists' view of America that took hold, not the national point of view, not Alexander Hamilton's constitution, nor that of James Madison, who wanted a complete and total congressional veto power over every single act of the state legislatures.

What the Constitution established was a real federal government, the kind of government that the Antifederalists would have liked to have proposed but were suspicious of because it was the kind of government that came out of Philadelphia. I would say both sides were, on the whole, pleased with the Constitution that was ratified and the kind of government that it established.

The Debate Over Ratification in Virginia

Richard R. Beeman

I thought I would speak a little bit about one piece of this ratification puzzle, a case study that I think illustrates particularly well some of the principal lessons of the ratification struggle. That case is, as John Kaminski indicated, that of Virginia, a state in which both the Constitution's strongest supporters and most vehement opponents were very much in evidence.

Profile of Virginia: The People and the Politics

If any state should have been suspicious of the potential of this new government to subvert the authority of the states and indeed of the people, and to subvert it for no apparent reason, then that state would have been Virginia. This was a state that conceived of itself, accurately in fact, as the oldest and most populous state in the union, a state with an extraordinarily distinguished tradition of political leadership, both before, during, and after the Revolution. It was a state that had proved itself capable of self-government—a self-government without the help of some other superimposed central government. It was a state in which most of its citizens—Jefferson being the most notable—when they referred to "my country," were referring to the state of Virginia, not to the United States of America.

Moreover, in the eyes of many state politicians, Virginia had weathered the crisis of the American Revolution quite nicely by itself. It had mobilized the solid support of its citizens for the Revolutionary War effort; there were relatively few traces of loyalism within the state.

The economy of Virginia, a staple agricultural economy specializing in tobacco and, increasingly, in wheat, had rebounded from the disruption of the war. All of the economies of most of the states experienced some disruption, given the fact that America's principal trading partner, Great Britain, was at war with them for a time. But after that war was over, the tobacco and wheat economies of Virginia were rebounding quite nicely, and quite frankly those sorts of economies were not the sorts over which any government, be it state or central, had too much control. That really was an area of private initiative.

Most important, for the Virginia people most directly involved—and here I do draw on my old friend Patrick Henry, who had served as governor of the independent state of Virginia for a number of years during the period between the outbreak of the war and the creation of the Constitution—that state government had proved more than adequate to meet the essential needs of the citizens. It had proven more than adequate to provide for the common defense, to maintain the public order, to promote the general welfare. These were the purposes of government articulated in the Preamble of the Articles of Confederation. These were the purposes for which any government was to be

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instituted. And these functions were performed quite well, in the eyes at least of people like Patrick Henry, by the state government of Virginia. So they had plenty of reason to be pretty suspicious of a movement to subvert the authority of this particular state government.

Virginians' Attitudes on the Eve of the Philadelphia Convention

Yet Virginians were, nonetheless, willing to send delegates from Virginia to Philadelphia in the spring and summer of 1787, at least to consider amendments to the Articles of Confederation. I think that there were two reasons why they were willing to do this, and once they had done so, to sit back and not be too suspicious about what was going on up there.

The first, and perhaps most important, reason was George Washington. As Virginia's and America's foremost citizen and head of the Virginia delegation, he surely could be counted upon to look after Virginia's interests in Philadelphia.

Equally important—and this is a fundamental, practical advantage that the federalists enjoyed in every state—was that all Virginians except those very few who were in the Philadelphia Convention were deprived of the ability to learn what was going on there over the course of the summer. Quite frankly, no one in Virginia expected the sorts of dramatic happenings that ultimately transpired in Philadelphia. Indeed, that included Virginia's principal political leader, Patrick Henry (I think of George Washington as America's principal political and military leader but Patrick Henry more than Washington as Virginia's principal political leader), who was elected to serve in the Convention—the only person who got more votes than he was George Washington. (Henry got far more votes than James Madison, for example). Henry just didn't think it was worth his while—he had other things to attend to in Virginia, so he passed up the opportunity to go to Philadelphia to participate in those deliberations. The decision of the members of the Constitutional Convention to carry on their deliberations in secrecy was an unusually important disadvantage from which the Antifederalists would suffer.

If Patrick Henry had been aware of what was going on in the Constitutional Convention, indeed, if he'd been aware of what was going on as early as May 29, he would have been on his horse riding up to Philadelphia and would have joined the Virginia delegation. On May 29 Gouverneur Morris introduced a resolution into the Convention stipulating that a "merely federal government" would not meet the needs of the country and that what was required was the creation of a "national government" with a supreme legislative, executive, and judiciary. That resolution was passed the same day by the Convention delegates; it wasn't a final, binding vote, but it did offer dramatic proof of the direction in which the Convention was heading. It was a direction that Henry would have abhorred, and had he known about it he would have joined the Convention in its deliberations and almost certainly worked to halt its movement toward a "national" government. But the fact of the matter is that Henry and others like him were deprived of that information, so they enjoyed their summer in Virginia in blissful ignorance.

The Antifederalist and Federalist Campaigns in Virginia

When the Constitutional Convention adjourned and the results of its labors became public, supporters of the sovereign power of the state of Virginia, like Henry, were absolutely aghast.

Patrick Henry

When Patrick Henry received a copy of the Constitution from Washington he was flabbergasted and taken completely by surprise. He recognized the proposed new government as a major threat to Virginia's sovereignty. He recognized that immediately. He rather politely phrased it in his response to Washington, but it was plain that he was not pleased. But Henry had not had the benefit of three and a half months of intense study and debate through which he could formulate his objections to the Constitution. And Antifederalists everywhere would suffer from that same disadvantage. Most of the principal Federalist leaders had, in fact, been a part of the Constitutional Convention. They'd really worked through a lot of the objections that people like Henry would only begin to be able to raise, beginning in the fall of 1787.

James Madison

By contrast, the Federalists in Virginia mounted a well-orchestrated campaign. James Madison was the leader of that campaign. He was, of course, one of the principal architects of the constitution in Philadelphia. As such, he was well prepared to take on the task of being the principal author of *The Federalist Papers*. There was no doubt that in intellect Madison had a significant advantage over Henry. But in addition to that intellect he really did have the critical advantage of time.

George Washington

The other essential figure in the ratification struggle in Virginia, although largely invisible at the time, was George Washington. Washington, interestingly and characteristically, had agreed with some hesitation to come to the Convention in Philadelphia and lend his enormous prestige to that enterprise, and I think he did have a sense that he would be capable of embodying a consensus in the Convention by his presence, and so he chose to attend. He had no such confidence about his ability to embody a consensus in Virginia. He knew that there was going to be significant opposition to the

Constitution in Virginia and did not wish to get involved in that partisan struggle in his home state. So he stayed home, although he played an extremely important behind-the-scenes role in Virginia in helping Madison rally support for the document, particularly in working with what proves to be a critically important figure in this little melodrama, Governor Edmund Randolph.

Governor Edmund Randolph

Indeed, I want to say a few words about Edmund Randolph here because in some sense, I think, he represents the dilemma that so many Virginians who found themselves on the fence on this question faced. Randolph, like virtually everyone else in America, wished to strengthen the Articles of Confederation. John Kaminski is quite right about that; there is overwhelming agreement on that. And indeed it's Randolph who presents the Virginia plan, that great initiative-stealing device at the opening of the Convention which sets the tone of the debate and creates a plan for a national government. So Randolph has a vision of a much stronger central government, but he did, over the course of the three and a half months in Philadelphia, come to feel that the final product diminished Virginia's role in the affairs of the country unduly. He was particularly concerned with the compromise on the apportionment of representation in the legislature which deprived Virginia of its full weight in the upper house. He was also concerned about the construction of the executive branch for rather different reasons.

To make a long story short, Randolph refused to sign the document in Philadelphia—one of the few members of the Convention who does refuse (another one of his fellow Virginians, George Mason, was one of the others). So Randolph comes home to Virginia, an opponent of the Constitution, but then between September of 1787 and June of 1788 George Washington and James Madison really do a job on Randolph, consistently working at him, writing him a number of letters in which they both stress that the adoption of the Constitution is essential to the maintenance of the public order but also, as in the case of John Hancock in Massachusetts, in which they appeal to Randolph's ambition. In my own view, it's certainly no accident that Edmund Randolph is the first attorney general of the United States under George Washington.

Who Won and How

In spite of these Federalist advantages and Antifederalist disadvantages, the sides really were dead even at the onset of the convention in June of 1788. Patrick Henry and Madison both admitted that it was too close to call.

Henry claimed, though, that if one were to take an equivalent of a Gallup poll among the ordinary citizens of Virginia at the time, 80 to 85 percent of the Virginians would be opposed to this government. He really thought that the voice of the people was still a voice that favored locating primary sovereign power with the states. So in that sense, Henry and the Antifederalists had some cause for optimism. Moreover, with George Washington absent from the Convention, with Henry and Mason present at the Convention—and Mason had been in the Philadelphia Convention, so he was a little bit better prepared with some Antifederalist arguments than others—I think the Antifederalists felt at least some optimism.

Of course, the events in the ratifying Convention would ultimately prove that optimism ill founded. What followed was a remarkable oratorical combat between James Madison and Patrick Henry, a contest in which one would have thought that Patrick Henry would have been the overwhelming morning line favorite because it really was Henry who was capable of the greatest oratorical pyrotechnics. In fact, though, most historians have concluded that James Madison defeated Henry in that contest, if not by a knockout at least on points.

Madison, I think, was the victor for two reasons: one, he was better prepared, and two, he had thought more probingly and more deeply about this subject than Henry. Other factors arise in that Henry makes what really turns out to be a horrible tactical error, as you can see if you read Jonathan Elliot's debates on the Convention (and also ultimately you will be able to read all about this in John Kaminski's multi-volume work): Henry speaks for an enormous amount of time during the Convention. The debates in Elliot run 500 and some odd pages, and Henry's speeches account for probably 150 to 200 of those. He launches a full-scale attack on virtually every aspect of the Constitution ranging from his central objection, which is basically that the proposed government steals the sovereignty from the state of Virginia, down to the pickiest details—the lengths of senator's terms, the ratio of representation, whether one should require three-quarters or two-thirds of the Senate for a ratification of treaties, and so on. And most of these details are, in fact, things that people like James Madison in the Philadelphia Convention had hashed out long ago. Madison proved, I think, easily able to turn those kinds of arguments aside.

So if we're judging it as a debating contest, I think Madison wins. But it wasn't just a debating contest—there were some practical concerns at stake as well. The Federalists made some key appeals to undecided delegates from the western portions of Virginia—delegates who were worried about the inadequate state of defense provided by the state government of Virginia for their areas—and promised those delegates that things would be much better under a stronger central government with a better defense capability. Indeed, a few of those delegates, particularly from the northwest, came around to support the Constitution. Perhaps most crucially, as in other states, leading Federalists in the Virginia ratifying convention (although Madison was not one of them)

countered Antifederalists' demands for amendments to the Constitution with a promise to support limited amendments after the Constitution was adopted.

As John Kaminski, again, has quite appropriately argued, the Antifederalists were not against change. Almost everyone in America thought that some form of change in the Articles of Confederation was necessary—even Patrick Henry. The Antifederalists just did not like the particular form of change embodied in this particular draft of the Constitution. The Antifederalists' strategy, particularly by the time that the debate gets down to Virginia and New York, is to call for a second Constitutional Convention before ratifying this draft of the Constitution, a convention that would consider amendments to the Constitution. The idea of amendments that Antifederalists like Patrick Henry had were pretty major amendments that in a substantial way would have stripped much of the power away from this government. So this really was a somewhat devious device, I think, to undo the work of the Philadelphia Convention. In any case, that's the Antifederalist strategy. The Federalists in Virginia, as elsewhere, combat that strategy by saying, "Hey, listen, don't get us wrong—we're in favor of amendments too, but we've got an immediate crisis; we've got to ratify the Constitution first, and then we'll turn to amendments second." That appeases enough people so that a few others come over to support the Constitution on those grounds.

I think most important of all, though, in 1788, as in presidential primaries in 1988, was the "big mo"—momentum. The principal Federalist advantage from the very beginning was that they were able to generate momentum in favor of the Constitution. They get off fast, again as John has indicated, with quick ratifications from Delaware, Pennsylvania, and New Jersey, and then they follow that up fairly quickly with ratifications from states like Connecticut, Georgia, South Carolina, Maryland, and so on. By the time Virginia was deliberating on the Constitution, nine states had already acceded to the federal union, although Virginia did not know about New Hampshire at the time that it was carrying on its debate. The situation, therefore, in June of 1788 was very different from what it would have been if Virginia had voted in September of 1787.

The crucial swing man here again, both in terms of his influence and the more general dilemma which he represented, was Edmund Randolph. (It's important to remember in this contest that Randolph is perhaps not as prominent to us today but in the context of Virginia in 1788 he was a real heavyweight.) He rose in the Virginia convention and reaffirmed his doubts about the Constitution, reiterating that he thought it was defective in the construction of both the legislative and the executive branches. But then he went on to observe that the choice was no longer simply between the status quo—the status quo being an independent sovereign state of Virginia competing among other states as the first among equals—and a defective federal constitution. Rather, now that nine states had ratified, Virginia's choice was between existence within a mildly defective union or a lonely existence outside of that union, competing not only with twelve separate states but with a consolidated phalanx of all of the states united in union. The vision that Randolph depicted of Virginia confronting tariff barriers, economic competition, and boundary disputes with this new nation was a foreboding one indeed. Many in the Virginia Convention were willing to take the risk—indeed, 79 out of 178 in the convention still voted no on the Constitution when it came down to it on June 27—but the Federalists had managed to swing over a sufficient number of undecided delegates to their side to win victory by a narrow margin.

Conclusion: Implications of the Federalists' Victory

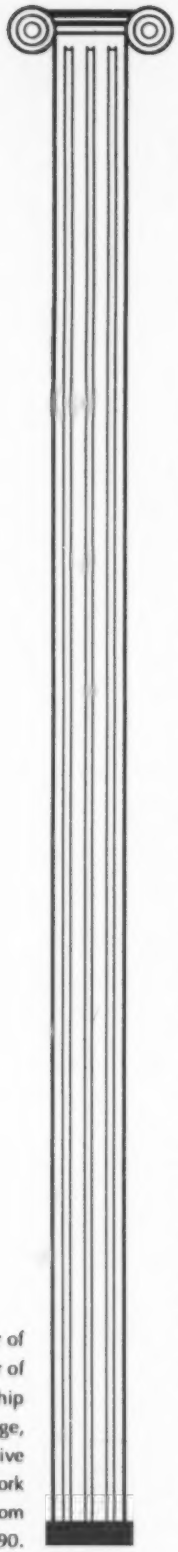
As we review the events surrounding ratification of the Constitution in Virginia, two general conclusions emerge, one obvious and another less obvious.

The obvious conclusion is the enormous tactical advantages from the beginning to the end that the Federalists enjoyed. They were better prepared, and they were better connected. Their victory was not simply a victory for the superior moral and intellectual character of the position they were taking; it really was a tactical advantage that they enjoyed.

The second point that I want to make is less obvious and less relevant to my topic today, but it is my hobby horse, so I'm going to conclude with it anyway. That is that Virginia is a striking example of the problematic character of current notions of "original intent" as they get bandied about in the contemporary constitutional discourse. If original intent is to have any legitimate meaning, that intent that we're searching for must represent that of those Americans who ultimately gave their consent to the Constitution.

The Constitution that emerged from the Constitutional Convention in Philadelphia was in fact a set of recommendations from a group of men who had only limited power to make recommendations. The Constitution truly could only assume legitimacy after the true sources of the constituent power—the people themselves—gave it that legitimacy. But when we seek to find the intent of those who added their affirmative votes to the Constitution, we find that intent is so mixed and so muddled that it becomes impossible to discern. It ranges from people who *thought* they knew what they were getting into like James Madison, who, if you asked him maybe seven or eight years later, might have a different view of what he thought he was doing in 1787 to 1788, to people like Edmund Randolph, who was extremely skeptical about

the wisdom of the decision that he was making, to people like Patrick Henry, who really did have to be dragged into the union kicking and screaming. We find that intent is so mixed and muddled that it proves a very dubious guide to us poor mortals in the late twentieth century. I think we need to look elsewhere for guidance.



The Debate Over Ratification in New York

Stephen L. Schechter

I want to speak primarily about why New York State took so long to ratify the Constitution, but I also think it's important to relate my remarks to those of the two speakers who have preceded me and note that you're presented here with two case studies that fall under Kaminski's seventh stage of ratification.

I quite agree that Virginia and New York are quite close in their own history of the ratification, and as a New Yorker born in Virginia I would like to think that New York State and Virginia constitute a stage unto themselves. But though in many respects, and, in the most basic of respects, their histories are quite similar on the matter of ratification, I should also note some of the differences between these two major states.

First, their similarities. They are similar, of course, in that they both ratified at approximately the same time—that is, after the ball game was over, so to speak, after the ninth and decisive state, New Hampshire, had ratified. They are both similar in that one of the most basic reasons for their delay was that they felt, and much of the conditions of the time so indicated, that they were well along in the process of recovery—economic recovery, political recovery, social recovery—from the Revolution and its aftermath and did not altogether need the new system that was proposed. It's also quite true that Virginia Antifederalists and New York Antifederalists joined the rest of the nation in believing that a stronger national government was possible, but Virginians and New Yorkers were also skeptical of a good part of the proposed document.

The Different Cases of New York and Virginia

So they are similar in many respects, but they are, of course, quite different in other respects. When one thinks of why New York State delayed, and when one reads textbooks regardless of the grade level, there is one word that features prominently: that is the *impost*. One thinks of the fact that New York State had an impost, a tax or duty on imported goods, that composed a considerable proportion of its revenues and that the proposed Constitution would threaten to eliminate that important source of revenue. This, of course, is a major reason why New York State was so skeptical and concerned about the new document, a skepticism and concern that Virginians did not share with quite the same degree of self-interest. That, of course, is one major difference.

Another major difference is the quite different roles that representatives from the two states played at the Constitutional Convention. Credit for the Constitutional Convention's success, more often than not, goes to Virginians; to James Madison and to the Virginia plan. I've heard no one credit

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New York representatives at the Constitutional Convention. Alexander Hamilton becomes a latter-day hero as Publius, but at the Convention Hamilton was looked upon as an ambitious man who could not keep his eye on the clock, and who put forward a plan that didn't have its eye on history either.

In textbooks you hear much mention of the Connecticut plan and the Virginia plan and the New Jersey plan but very little of the Hamilton plan, and no one in New York has chosen to label it the New York plan. It was a plan put forward by Hamilton in five to six hours of oration. However long it lasted and however cool that summer might have been, five or six hours of oration tends to turn off any listener. Hamilton proposed a plan that suggested following the British plan of government: he proposed a popularly elected Congress, which would then select every other branch of government for life, a plan that met with very little success.

Another major difference between Virginia and New York is that while Virginian Antifederalists may, indeed, not have known what was going on in Philadelphia, there is strong suspicion that Antifederalist leaders in New York did know what was going on. The other two representatives at Philadelphia from New York State, John Lansing and Robert Yates, walked out of the Convention never to return (Hamilton walked out and would return). They are believed to have shared their impressions about the convention with Governor George Clinton and with others who may well have begun planning their counter-strategy early on in the game. I'm sure there are other differences that might emerge between these two major states, but I share these with you at the outset.

Why New York Delayed: Clintonism

Why did a major state like New York State delay so long? The answers I've suggested earlier are due partly to the way the question is put. New York State was a major state and chose to delay so long because it *was* a major state. I don't know whether high school textbooks continue to maintain without any qualification whatsoever that the time of the confederation was a crisis time. But for New York State the time of confederation is best understood as a crisis time not in the sense of panic as we today might understand the word *crisis*. It was understood as a time of state building—a time of state building that had been much delayed, a time of state building that drew all the creative energies of its citizenry and of its leaders. The leadership of the day dominated by the figure of George Clinton, governor of New York since 1777, had built, as leaders would do in subsequent generations and centuries around the world of developing societies, a polity or complete political system, intellectual as well as policy- and law-oriented development strategy.

In New York State that development strategy became known as Clintonism, after its founder. Clintonism first and foremost was a strategy oriented toward economic development—economic development for the state and economic development for the new aspiring middle class, both on and off the farm. One of the principal elements of that strategy was revenue raising, and that revenue-raising strategy consisted primarily of the impost, a politically clever source of revenue that provided revenue without being directly felt by the voting majority. John Kaminski has, quite correctly, indicated that the population—Federalists as well as Antifederalists even in a state like New York—was tied primarily to the land. Hence, a source of public revenue tied not to the land, but rather to imported goods, was probably perceived by the electorate as a benefit for them, designed to ensure that they would not have to face a heavy property tax. Other parts of New York's economic policy provided lands to and otherwise helped the new aspiring middle class.

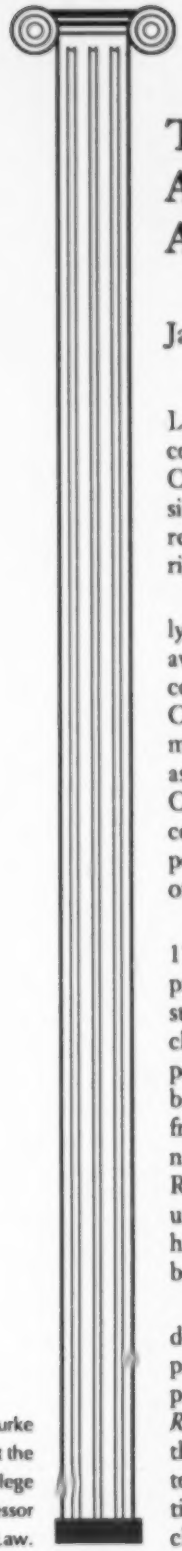
More than an economic policy, Clintonism was a public philosophy. It was a philosophy that is often misunderstood when applied to the ratification debate because it is often assumed to be nothing more than a States' rights philosophy. It was more than that. It proposed a society, a republican society, housed within polities much the size of New York State, which could make life not only secure but better for the citizenry if they were the primary engine of public policy and public life. The confederation and the federal government would come in after the fact, so to speak, whenever what economists would term "externalities" needed attention. But the ties that bind were really to the states as polities—as constituent polities and members of the Articles of Confederation. The state would be the provider not only of secure life but of the good life. States' rights, I think, too narrowly confines this philosophy, as does the view of the Articles of Confederation and the time of the Confederation as crisis ridden.

New York State and Virginia offer, I think, very exciting case studies for the teacher. They offer case studies that defy the conventional wisdom. They offer case studies that at least some states were not in crisis times but were in recovery times. In the process of state building they were presented with a virtually ratified proposal that would change the system as they understood it from being state based to nation-centered.

How Virginians responded and how New Yorkers responded to this proposal in their own state conventions in the summer of 1788 becomes, then, a fascinating case study of how states accept a new world turned on its head. It is a case of the politics of compromise in the best sense of the word. It's a study in New York State of how great compromisers and diplomats John Jay, the Federalist, and Melancthon Smith, the Antifederalist, were able to bring together their respective sides. The sides had been opposed for a decade ever since the first gubernatorial election in New York State was won by Clinton, who had become the leader of the Antifederalists over Philip

Schuyler, who had remained the leader of the Federalists along with his son-in-law, Alexander Hamilton. It's a study of how these long opposed sides differing not only on constitutional grounds but on economic and philosophical grounds, could finally come together. That, I think, bears much study, as does the first question with New York and Virginia as case studies, namely, Why did these two major states delay so long?

Equal Justice Under the Constitution



The Constitution: A Political Document With An Ambiguous Legacy

James A. Henretta

Let me begin by calling your attention to the tension, perhaps even the contradiction, between the title of this session, "Equal Justice Under the Constitution," and its content, the status of excluded groups and the "extension" of rights to them. If groups were excluded, why would we expect them to receive "equal justice," then or now? And why should dominant groups *extend* rights to these groups—unless they have to?

Thus, there is an assumption in this phrasing that we must examine carefully—an assumption that the Constitution embodies principles of justice that are available to all segments of American society. Indeed, I want vigorously to contest that notion by arguing two propositions. First, I argue that the Constitution was and is as much a political as a legal or philosophical document. Its rewards go primarily to the politically powerful or the politically astute. Second, I will argue that the historical circumstances in which the Constitution was created shaped its character in fundamental ways—so that it contains and may always contain certain biases that favor some groups and penalize others. Some individuals and groups were the heirs of the framers; others were the disinherited.

As you know, the Philadelphia Constitution was a political document in 1787. Antifederalists mounted impressive arguments against many of its provisions, and their views were widely held. The conventions in three crucial states ratified the Constitution only by narrow margins: 187 to 168 in Massachusetts, 89 to 79 in Virginia, and 30 to 27 in New York. And it took a major political effort—not to mention intimidation and fraud—even to win those bare majorities. Nor did ratification end the political struggle. By 1794 the framers had split into bitterly opposed political parties. Protesting against the nationalist economic policies of Federalist Alexander Hamilton, Democratic-Republican James Madison—the architect of the centralizing Constitution—used the localist and States' rights doctrines advocated by the Antifederalists, his previous opponents. Constitutional debate, like politics, makes strange bedfellows.

As ratified and subsequently amended, the Constitution remains a political document. The Mobil Oil Corporation recently published a nicely printed pamphlet that some of you may have received. It is composed of previously published newspaper advertisements and carries the title *The Second American Revolution.* The purpose of the pamphlet, explains Allen E. Murry, chairman of the board and chief executive officer of Mobil, is to alert scholars and teachers to "the economic aspects of the Constitution." In Mobil's view, the Constitution was designed to counteract what Elbridge Gerry, a delegate from Massachusetts, called "the danger of the levelling spirit," and threats posed by this

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spirit to the rights of economic creditors. "Our Consitution," Mobil concluded, "gave birth to modern free-market capitalism."

Mobil's political agenda is transparent: it seeks to win legitimacy for its corporate ideology by appealing to the views of the framers. Its interpretation of the Constitution has a distinguished, if problematic, ancestry. Mobil explicitly accepts the argument advanced in 1913 by the historian Charles A. Beard in his pathbreaking study, *An Economic Interpretation of the Constitution of the United States*. But that is the problem. For the economic motivation that Mobil praises, Beard condemned. Beard believed that the Constitution was an economic conspiracy designed by wealthy Americans to preserve their personal financial interests and those of their class. In his eyes the Constitution was not a movement for liberty or equal justice, not a "Second American Revolution," but rather a conservative counterrevolution against democratic ideology and democratic legislation in the states. In fact, Beard's *An Economic Interpretation* represented an extraordinarily effective attack, by a political progressive, against the wealth and power of large American business corporations. It is truly ironic that one of those corporations would seek to appropriate Beard's critical, indeed radical, Progressive perspective on the Constitution. In historical interpretation, as in history itself, politics makes strange bedfellows.

My intention is to encourage not political cynicism but constitutional and historical realism. And my particular concern is with the character and dimensions of American constitutionalism during the period between the Revolution and the Civil War. The revolutionary republican doctrine of popular sovereignty placed ultimate authority in the hands of "the people." The Constitution itself begins "We the People." But who were "the people"? Did "the people" include women as well as men? Black slaves as well as free whites? Those of native American, as well as European, descent? Moreover, did republicanism extend beyond legal equality to encompass social justice?

Aristocratic Republicans Versus Democratic Republican Ideologies

In answering these questions, I will refer to some of the points made in the various readings. Americans passionately debated most of these questions between 1776 and 1789. Some Americans—and most of the framers of the Constitution—gave an "aristocratic" definition to republicanism; they preferred a society based on inherited wealth and family status and championed rule by a "natural aristocracy." Alive to their own financial interests, they questioned the wisdom of a social order based on equality of opportunity and economic competition. "Fellows who would have cleaned my shoes five years ago," complained James Warren, a Boston aristocratic-republican, "have amassed fortunes, and are riding in chariots." Aristocratic-republicans likewise lamented demands for political equality generated by the Revolution. "Depend upon it, Sir," John Adams declared in a private letter, "it is dangerous to alter the property qualifications of voters." If property qualifications for voting were lowered, he warned: "there will be no end to it. New claims will arise; women will demand a vote ... and every man who has not a farthing will demand an equal voice with any other, in all the acts of state." The result, Adams thought, would be "to confound and destroy all distinctions and prostrate all ranks to one common level."

Adams feared the demands of a second group of Americans, "democratic-republicans," who envisioned a society characterized by greater legal and social equality. This subversive threat surfaced within Adams's own household, when Abigail Adams questioned the patriarchal authority of husbands. Abigail rejected traditional religious precepts regarding family life, such as those articulated by Boston minister Benjamin Wadsworth. "Wives submit yourselves to your own Husbands," Wadsworth declared; "be in subjection to them." To the contrary, Abigail urged John and the other men in the Continental Congress to "remember the Ladies, and be more generous to them than your ancestors [were]." "We know better than to repeal our Masculine system," the future delegate to the Philadelphia Convention replied with jocular condescension: "in Practice you know we are the subjects. We have only the name of Masters."

In fact, legal rules ensured male dominance in the new republican family. The Constitution did not mention women. Statutes enacted by state legislatures perpetuated traditional English common law restrictions on married women. The legal condition of *coverture* limited the rights of married women to own property, to sue, or to make contracts and wills.

Yet democratic-republican ideology encouraged demands for the legal emancipation of women. In 1779 Judith Sargent Murray of Gloucester, Massachusetts, composed an essay, "On the Equality of the Sexes" and published it in 1790. Another upper-class young woman, Eliza Wilkinson, was equally critical of existing customs: "The men say we have no business" with politics, she complained, "but I won't have it thought that because we are the weaker sex as to bodily strength we are capable of nothing more than domestic concerns. They won't even allow us liberty of thought, and that is all I want."

Those American public leaders who responded positively to female demands for greater equality confined women to a "separate sphere" of activity. Benjamin Rush of Philadelphia praised "republican mothers" who instructed "their sons in the principles of liberty and government." This concept of "republican motherhood" was an important legacy of the constitutional era. It legitimized the role of women as moral educators,

previously a male preserve. As the Reverend Thomas Bernard told the Female Charitable Society of Salem, Massachusetts, "Preserving virtue and instructing the young are not the fancied, but the real "Rights of Women."

Republican motherhood represented one definition of the constitutional position of women, and one that has survived in an attenuated form until the present. It prescribed that women would remain subordinate to men, and in a "separate sphere," not full and equal participants in the political or economic life of the society. Some advocates of republican motherhood sought to improve the rights and status of women within this limited sphere. They successfully campaigned for legislation permitting married women to own property and to divorce errant or abusive husbands. By 1860, a number of states allowed divorce for cause and permitted women to own property and execute contracts. However, these legal changes were limited, and they assisted men (debtors seeking to shelter family wealth from creditors, for example) as much as women. As an "aristocratic-republican" doctrine, republican motherhood kept women in the role of second-class citizen.

Growth of Equal-Rights Ideology

That doctrine was challenged, in the 1840s, by the "democratic republican" ideology of "equal rights." This ideology had its American roots in the Revolution, in demands by ordinary yeoman farmers and urban artisans for political rights. As you have read in the *In These Times* article by Alfred F. Young [September 9, 1987] the demands of the "people out of doors" had a powerful effect on the delegates. They feared "the ghosts" of Thomas Paine, the proponent of a democratic government in which a single elected legislature would reign supreme; Abraham Yates, a state politician who responded to the needs of indebted farmers in an era of agricultural recession; Daniel Shays, the leader of a rebellion of debtor farmers, and Thomas Peters, a slave who sought freedom through loyalty to the British Crown and armed struggle against patriot slaveowners.

As Young argues, the delegates were determined to use force to suppress the social groups symbolized by Shays and Peters. They also saw the need to accommodate the threats to their interests and values posed by the followers of Paine and Yates. And so the aristocratic-republicans at Philadelphia did not attempt the disenfranchisement, by constitutional fiat, of what Benjamin Franklin called "the lower class of freemen." "The Constitution was as democratic as it was," Young concludes, "because of the influence of popular movements that were a presence, even if not present, at the Philadelphia convention."

Roles and Rights of Women

Beginning in the 1830s, a few Americans used this ideology of equal rights to define new goals for women—full civil and legal equality. This definition of reality had been too radical even to contemplate in 1776 or 1789. Abigail Adams asked John only to extend a few legal privileges to women, not to accept them as political equals. Civil equality became an intellectual option because of two historical developments. Between 1789 and 1830, the United States became what most of the framers hoped to prevent: a political democracy with universal white male suffrage. It also became a society filled with movements for moral reform, crusades in which morally active republican mothers played an important role. Out of these reform societies, particularly out of the American Anti-Slavery Society, came women who demanded for themselves what they sought for enslaved blacks: an end to the tyrannical abuse of power whether by slaveowners or husbands.

The crucial year was 1848. In Buffalo, New York, Henry Stanton was one of the founders of the Free Soil Party, which sought a political and constitutional restriction of slavery. A few hundred miles away, in Seneca Falls, New York, his wife Elizabeth Cady Stanton was similarly employed with respect to women's rights. She called together the first Women's Rights Convention and helped to compose its Declarations of Sentiments and Resolutions. The Declaration enumerated the various legal disabilities of women and urged them "to secure to themselves their sacred right to the elective franchise." These Women's Rights advocates conceived of women not as dependent daughters or wives but as "individual citizens." In their view, women's status did not proceed from their position in the family—the assumption underlying "republican motherhood"—but from their membership in the polity. As the Third National Women's Rights Convention declared in 1852, its members sought the political "rights, for which our fathers fought, bled, and died" in the Revolution.

These two definitions of the legal and constitutional position of women—as "republican mother" or as "equal individual"—remain with us still, defining the contours of present political struggles.

Debate over Slavery

Also with us still is the debate, pushed forth by Henry Stanton's American Anti-Slavery Society, as to the status of blacks in the United States. In 1787, no fewer than 750,000 blacks (20 percent of the total population of the United States) were held in hereditary bondage. On the eve of the Philadelphia Convention, however, the twin ideological movements of democratic-republicanism and evangelical Christianity made blacks' servile status the subject of political debate. In 1784, for example, a convention of Virginia Methodists condemned slavery as "contrary to the Golden Law of God on which hang all the Law and Prophets, and the unalienable Rights of Mankind, as well as every Principle of Revolution." Yet as John Hope Franklin points out, white Methodists

opposed slavery but favored racial discrimination. By segregating free black believers in the rear of the gallery, the white majority in Philadelphia's St. George Episcopal Church promoted a black walkout and the creation of the American Methodist Episcopal (AME) Church.

Nonetheless, religious and republican arguments against slavery laid the basis for black emancipation in the northern states, where there were relatively few slaves. By 1800, all states north of Delaware had either abolished slavery or provided for its gradual end. The abolition of slavery highlighted a contradiction within American republican ideology. American patriots had fought the British not only for their lives and liberty but (as the Mobil Corporation has reminded us) for the rights of private property. The three values were closely linked in republican theory. The Massachusetts Constitution of 1780 protected every citizen "in the enjoyment of his life, liberty, and property, according to the standing laws." The Virginia Bill of Rights went further: it asserted that the "means of acquiring and possessing property" was an inherent right. Like John Adams, the authors of most state constitutions believed that only property owners could act independently. Therefore they restricted voting rights to those with freehold estates. For them, republicanism was synonymous with property rights.

There was the rub. For slaves were property. To protect white property rights, the Pennsylvania Emancipation Act of 1780 did not free slaves already in bondage. The act awarded freedom only to slaves born after 1780—and then only after they had served their mothers' masters for twenty-eight years. In fact, aristocratic-republican ideology in America was derived ultimately from ancient Greece and Rome and was fully compatible with slavery. "As free men," the poet Euripides had written of his fellow citizens in the ancient Greek republics, "we live off slaves."

Aristocratic-republican ideology combined with economic self-interest to prevent the emancipation of slaves in the South. Slaves accounted for 30 to 60 percent of the population in the southern states and represented a huge financial investment. Some Virginia slaveowners favored manumission, the voluntary grant of freedom by owners to slaves, but there were no white advocates of legal emancipation. Indeed, the demands of Georgia and South Carolina rice planters at the Philadelphia Convention resulted in a clause (Article I, section 9) that prevented Congress from prohibiting the transatlantic slave trade until 1808. By 1808, southern whites had purchased and put into bondage an additional 250,000 Africans—as many slaves as had been brought into all the mainland colonies between 1619 and 1776.

Interpreting the Constitution

Article I, section 9 thus wrote support for slavery directly into the Untied States Constitution, as did two other clauses—one directing the apprehension and return of fugitives who crossed state lines and the other counting slaves as three-fifths of whites to determine representation in the lower house of Congress and the electoral college. To blacks and to many white abolitionists, the Constitution was the bulwark of slavery. In 1843, for example, abolitionist Wendell Phillips published a book called *The Constitution a Pro-Slavery Compact.* Using Madison's notes of the Convention's proceedings, Phillips argued that the Constitution was "an infamous ... bargain" between northern and southern elites. Its authors, he charged, had "bartered honesty for gain and became partners with tyrants that they might share in the profits of their tyranny." Using the rhetoric of evangelical Christianity, Phillips condemned the Constitution as a "covenant with Death and an agreement with Hell ... [that] should be immediately annulled."

Phillips and his associates urged "a moral and peaceful revolution to effect the overthrow [of the Constitution] in accordance with the doctrines laid down in the Declaration of Independence." In their eyes, the Declaration stood for freedom and human rights; the Constitution for slavery and human bondage. Indeed, providing the conceptual framework later used by Charles Beard, abolitionist historians of the Civil War era argued that a "counterrevolution" had occurred at the Constitutional Convention of 1787, overwhelming the possibilities for black emancipation. The abolitionists overstated their case. As the examples adduced by John Hope Franklin clearly show, racism pervaded the early republic. It resulted in free blacks being excluded from the militia by congressional fiat, being denied voting privileges in Washington, D.C., and the Indiana Territory (and here we should note that present-day resistance to statehood for the District of Columbia is the result, in some degree, of racism—for the District would probably elect two black senators), and being subjected to seizure without due process of law by the fugitive slave laws of 1793 and 1850.

Some blacks sought to use the Constitution for their own ends. In 1797 free blacks in North Carolina urged the national government to prevent their harassment and kidnapping in the name of "public justice." They recognized the jurisdictional barriers posed by the federal system but argued that this was "a Governmental defect, and not a direct violation of the declared fundamental principles of the Constitution." Three decades later (and here I differ from John Hope Franklin's argument), the Black Convention Movement of the 1830s began to construct a theory of constitutional interpretation that gave national sanction to the voting rights and legal privileges of free blacks, then under attack in many states, such as Pennsylvania, which disenfranchised blacks in 1837. This theory drew upon the Preamble of the Constitution, with its invocation of "We the People" and its goals of establishing justice, promoting the "general

Welfare," and securing the "Blessings of Liberty." The Preamble, the leaders of the Black Convention Movement argued, "guarantees in letter and spirit to every freeman born in this country, all the rights and immunities of citizenship."

This proclamation, and others, represented an attempt to create an alternative constitutional tradition. White politicians and the Supreme Court were the official keepers of the Constitution. They enacted and upheld the fugitive slave acts of 1793 and 1850. And they declared, in the *Dred Scott* decision of 1856 and its enforcement by president-elect James Buchanan, that free blacks never had been, and therefore never could be, citizens of the states or of the United States. The actual historical truth was otherwise, since many free blacks, however much discriminated against, were citizens of various northern states in 1787. Then, as now, there is no necessary congruence between historical fact and constitutional interpretation.

The Thirteenth, Fourteenth, and Fifteenth Amendments

The Civil War brought the first alteration of the nation's charter since the constitutional era. The Thirteenth, Fourteenth, and Fifteenth amendments ended slavery, extended citizenship and voting rights to blacks, and vastly increased the potential power of the national government to protect the "privileges and immunities" of all citizens. These amendments wrote into constitutional law—though not into political and social practice—the alternative black constitutional tradition.

These amendments almost enfranchised and expanded the legal rights of women as well. Women's rights advocates had strongly supported the abolitionist movement. In 1863, they joined with congressional radical republicans to campaign for the Thirteenth Amendment abolishing slavery. Indeed, they mounted a great popular campaign, the first ever in support of a constitutional amendment, submitting a petition with more than 400,000 signatures. They were equally supportive of the Fifteenth Amendment, dealing with voting rights. Black suffrage, Elizabeth Cady Stanton observed, opened the "constitutional door" for female suffrage, and women hoped to "avail [themselves] of the strong arm and blue uniform of the black soldier to walk in by his side."

This hope was unavailing. Most Republican politicians did not accept the argument of Stanton and the American Equal Rights Society that "suffrage was a natural right [of all individuals]—as necessary to man under government, for the protection of person and property, as are air and motion to life." The Fifteenth Amendment extended the vote explicitly only to blacks and former slaves. Equally significant, the Fourteenth Amendment incorporated female inferiority explicitly into the Constitution, by specifying the number of "male citizens" as the basis for congressional representation. Here, in 1868, was the female equivalent of the three-fifths clause of 1787. Like black slaves previously, women now occupied a subordinate position in the American constitutional order.

This similarity in status was not accidental. It stemmed directly from the position of women and slaves in the social order of the early American republic. Both women and blacks were the legal and economic dependents of the white male property owners. Both groups lacked "independence," the autonomy required for full citizenship according to aristocratic-republican political theory. Indeed, women and blacks were both imprisoned in social and political institutions—the patriarchal family and the slave plantation—that were intended to secure their subordination, and did so at the tolerance of the political state. Plantation law, not state law, governed most relations between master and slave; and the legal "rule of thumb"—which allowed men to beat their wives with a rod that was no thicker than a thumb—symbolized male dominance within the family. Women and blacks took their primary identity from their private status as family members and slaves or people of color. They lacked full political and constitutional status as public citizens. As Joyce Appleby has argued, "the national commitment to a constitutional order grounded in natural rights was grafted onto a culture that was profoundly racist and sexist." ("The American Heritage: The Heirs and the Disinherited," *Journal of American History* 74 (1987) 798.

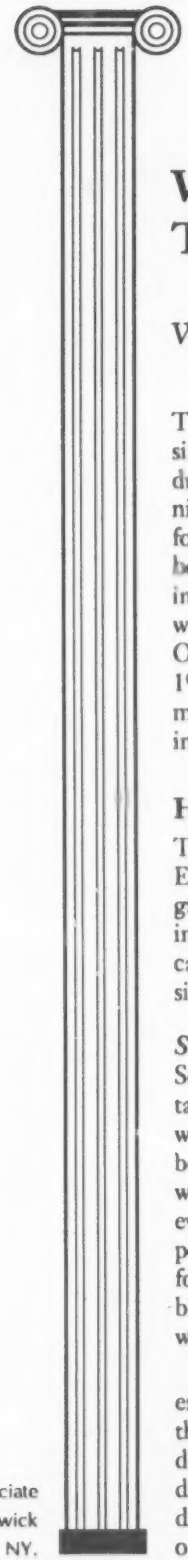
Conclusion: How to Look at the Constitution Today

The Constitution of 1787 provided a rich political and economic legacy to fortunate heirs while excluding many others. The disinherited included women, blacks, and white male Americans who believed in simple majoritarian government. The structure of the national government discouraged democratic outcomes, as did the amendment process. One-quarter of the states, plus one, has effective veto power over three-quarters of the states minus one. As a result, the U.S. Constitution has become a rarified document, altered more by an appointed Supreme Court than by the popular will. State constitutions, by contrast, have remained politically accessible documents, repeatedly amended, rewritten, and reratified by the people at large.

Judged by the democratic standards of the present, of the phrase *equal justice*, the Constitution of 1787 does not fare well. Even its most democratic aspect, the first ten amendments—the Bill of Rights—was the result of agitation by its Antifederalist opponents. But why should it? The authors of the Constitution did not want to write a democratic or, for that matter, a free-market capitalist document. Those viewpoints were essentially alien to their aristocratic-republican vision of the world.

Where does that leave us? What stance should we adopt toward the Constitution of 1787, given that many of its original animating principles are antagonistic to the more democratic society in which we live? My own inclination is to urge a critical stance toward the Constitution and its official interpreters. The Constitution was originally, and will always be, a political document. We should therefore conceive of it, as legal historian Martha Minow has suggested, "not as fixed rules, but as a framework for debate; not as a permanent solution, but as a reference point for continuing struggles."

The Constitution is not, in short, a document to be venerated without question. If veneration is the object, then we should bestow the greatest praise not on the delegates of 1787 but on succeeding generations of Americans—those men and women who made the Constitution work by seizing upon its virtues and overcoming its flaws. Better still, we should look upon the Constitution as a historically problematic document with an ambiguous legacy in the present. For the constitutionally disinherited are still among us, and equal justice has yet to be achieved.



Women and the Constitution: The Equal Rights Amendment

Winifred Wandersee

The Equal Rights Amendment has a long history that stretches back more than sixty years to the early 1920s—1923, to be precise—when it was first introduced by Alice Paul and the National Women's Party. From the very beginning there was tension and controversy surrounding the issue of equal rights for women, and the debate was not so much between men and women as it was between two different understandings of equality and the possibility of achieving it in the context of twentieth-century American society. It is important that we briefly consider the historical background of the debate over the ERA. Otherwise, there is a tendency to see it in the very simplistic terms of the late 1970s: i.e., the New Right-Moral Majority versus the liberal-left women's movement. But that debate has never been simple—not in the 1970s and not in the decade of the twenties, where it had its origins.

Historical Background

The ERA emerged at a time when the women's movement of the Progressive Era had just won a tremendous political victory: the Nineteenth Amendment, giving women the vote, had been passed by Congress and ratified by the states in 1920. The women who were responsible for this victory had approached the campaign from several different perspectives, which I will, for the sake of simplicity, loosely divide into two: social feminists and equal rights feminists.

Social Feminists

Social feminists (a term coined by historian William O'Neill) saw the importance of the vote as a tool for future social reforms to improve the position of women and children and family life in an industrial society. The underlying belief was that women were different from men, and that as future mothers, women needed protection from the evils of an industrial society. (And those evils were considerable.) The vote would provide women with the political power that would enable them to apply to the national and state governments for that protection—but only if women saw their commonality and voted as a block. The social feminists had what was essentially a collective sense of women's rights and responsibilities which was a legacy of the Progressive Era.

Muller v. Oregon (1908) was the landmark Supreme Court decision that established the legal basis for women's special treatment in the labor force through protective legislation. The problem is that in order to win this decision, advocates of protective legislation had to argue that women were different and that as "mothers of the race" they needed protection that men did not need. (An equal rights amendment would threaten that special position of women by removing the legal basis for protective legislation.)

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Equal Rights Feminists

The National Women's Party, led by Alice Paul, believed that an equal rights amendment was an absolute necessity if women were to be protected from discrimination in the labor force. These "equal rights" feminists viewed protective legislation for women as unfair and restrictive of their rights in the labor force. They tended to be middle-class women of the business and professional class who were not really in touch with the realities of industrial work. The NWP, and its support of the ERA, was opposed by social feminists in the Women's Trade Union League, the League of Women Voters, and the Women's Bureau of the U.S. Labor Department.

Thus, throughout the 1920s and 1930s, feminists were divided into two warring camps. During the 1930s the Great Depression took public attention away from the women's issue and focused it upon unemployment and relief policies. During the 1940s, World War II brought women into the labor force but did little to protect their rights either during the war or afterward when veterans came home demanding their jobs. The 1950s was a period of domesticity and family life, with only a few groups of women concerned with the issue of equal rights, and most Americans during these years had never even heard of the ERA or feminism.

The Presidential Commission on the Status of Women

The event that reawakened interest in an ERA was the establishment of the Presidential Commission on the Status of Women during the first year of the Kennedy administration. The Kennedy Commission was in part a response to the debate over the "women's question" during the 1950s and in part a political favor to women who had been active in the Kennedy campaign. It was chaired by Eleanor Roosevelt, who was aging and ailing. (She died in October 1962.) It was actually led by Esther Peterson, director of the Women's Bureau. It was intended to evaluate the position of women in American society, but in a nonthreatening way. Its goal was not equal rights for women but rather the old Progressive goal of protection—particularly the protection of working women. Peterson's influence on the commission was to steer it away from advocacy of what she called "that awful Equal Rights Amendment."

After almost two years of fact-finding, the commission's report—*American Women* (1963)—documented widespread discrimination against women and made twenty-four specific recommendations for guaranteeing equal treatment, including requests for a cabinet officer to follow up on the commission's recommendations and for an executive order requiring equal opportunity for women in private firms that received federal funds. The commission did ***not*** endorse an ERA, arguing instead that equality was already embodied in the "equal protection" clause of the Fourteenth Amendment. The commission's report reflected a basic optimism about the democratic system, the role of the federal government, and the good will of employers and educators.

Changes During the Sixties

There were, in fact, a number of changes in women's legal status that occurred during the 1960s:

- President Kennedy issued a directive reversing an 1870 law that had barred women from high civil service jobs;
- the Equal Pay Act of 1963 was passed after several years of intense lobbying; and
- the Civil Rights Act of 1964, Title VII forbade discrimination in employment based on sex.

But the Equal Employment Opportunity Commission (EEOC) was not interested in the issue of sex discrimination. Its failure to take action on this issue is what led to the formation of the National Organization for Women (NOW) in 1966. NOW started out as a group concerned with women's economic and legal status, but soon it encompassed many social issues as well.

A number of other organizational changes occurred during the sixties that served to lay a foundation of support for the ERA in the seventies. These included the establishment of state commissions on the status of women; the establishment of the interdepartmental Council on the Status of Women (ICSW), made up of the secretaries of those governmental departments concerned with the status of women; and the establishment of the Citizens' Advisory Council on the Status of Women (CACSW), composed of twenty private citizens appointed by the president. The council acted as a liaison between government agencies and women's groups. It was located in the Women's Bureau, from which it was able to distribute CACSW recommendations and position papers to state commissions, women's organizations, and individuals, thereby strengthening the emerging national network.

The CACSW pinpointed several key issues that were to become major concerns of the women's rights movement: it did this by setting up four task forces to review and update the recommendations of the Kennedy Commission. One of the most important and progressive was the Task Force on Family Law and Policy, which recommended a fundamental study of family property law and the preparation of a model law to protect the rights of married women in common-law states. It also addressed the issues of alimony, grounds for divorce, child custody, and married women's domiciles. It also examined the issues of abortion and birth control, recommending the repeal of laws making abortion a criminal offense and restricting access to birth control devices and information. Finally, the task force declared that illegitimate children should have the same rights as legitimate children.

At a time when the personal had not yet become political, even among New Left women, the CACSW Task Force on Family Law and Policy took a surprisingly progressive stance on many issues that were to become the focus of feminist activity in the 1970s. But the constituency that would respond to these issues had not yet emerged. (The women's movement was not yet a mass movement.)

Another organization, nongovernmental, was the Women's Equity Action League (WEAL), founded in the spring of 1969 as a spin-off from NOW. It was established by Arvonne Fraser, Bernice Sandler, and several other Washington activists for the purpose of focusing on women's legislative needs. It acted as a pressure group and also tried to build nationwide support for specific legislation. WEAL also published a report—the *WEAL Washington Report*—that listed all bills introduced in Congress dealing with women's issues.

Growth of Women's Movement with Mass Constituency

Political party reform, particularly with respect to choosing delegates to national conventions, strengthened the position of women in the Democratic party and, to a lesser extent, in the Republican party. In 1971 the National Women's Political Caucus (NWPC) was formed to support women's political advancement in both parties. The Democratic convention of 1972, in particular, was a remarkable achievement for liberal feminists. Two candidates emerged for high office—Shirley Chisholm and Sissy Farenthold; 40 percent of the delegates were women, compared with only 13 percent in 1968, and they were able to exert a strong influence on the party platform. The platform called for a "priority effort" to ratify the ERA, elimination of discrimination in jobs and public accommodations, extension of the jurisdiction of the Civil Rights Commission to cover women establishment of educational equality, extension of maternity benefits to all working women, elimination of tax inequities and permitting deduction of housekeeping and child-care costs as business expenses, extension of the Equal Pay Act to cover all workers, and appointment of women to top government positions.

The NWPC also had an impact upon the Republican convention, where 30 percent of the delegates were women. The Republican party also adopted the entire NWPC plank, with the exception of abortion, an issue that had led to a great deal of controversy at the Democratic convention.

1972 marked women's political coming of age, due to the activism of liberal feminists during the 1960s and to the emergence of a mass constituency by the early 1970s:

- Labor force participation and changing family structure resulted in a changing political consciousness among many women.
- The emergence of the New Left and the Women's Liberation Movement brought new and more controversial issues to the foreground.

Campaign Begins for ERA

The political feminists of the early seventies were concerned with a wide range of issues, but they soon focused their attention and energies on the passage of the ERA. Their success in putting the ERA on the policy agenda of the 1970s was in large part due to the bipartisan support the amendment received within mainstream political circles. During the Nixon years, it was Republican women—Pat Hutar, Anne Armstrong, Jill Ruckelshaus—who worked for the ERA in the White House, and after it passed in Congress they testified in state legislatures. Martha Griffiths, a Democrat congresswoman, was most responsible for its passage through Congress. The most dramatic philosophical shift on the ERA occurred in the Department of Labor. At a conference held celebrate the fiftieth anniversary of the Women's Bureau, in June 1970, Elizabeth Koontz, director of the Bureau, persuaded Secretary of Labor George Schultz to publicly announce his support.

In January 1972, when the Equal Rights Amendment was finally passed by the Senate, it enjoyed remarkable support from a far-flung constituency: it had passed the House by a vote of 354 to 23; in the Senate the vote was 84 to 8. Both major political parties had supported the amendment in their party platforms for years, and six presidents had endorsed it. A long list of national associations and interest groups, including every major women's organization, supported the ERA; the American Bar Association had adopted a resolution of endorsement; the climate of opinion indicated an awareness of the existence of sex discrimination and a willingness to end it through legal means. Twenty-two state legislature approved the ERA in that first year.

Opposition to ERA Expands

No one could have predicted in 1972 that the ERA would run into serious political difficulties and become a focus of a conservative backlash. Phyllis Schlafly was the individual most directly responsible for mounting the anti-ERA campaign and drawing thousands of supporters to her cause. Schlafly's initial power was her ability to communicate to an inarticulate and dispersed constituency through a monthly publication she had launched in 1967—the *Phyllis Schlafly Report*. In February 1972, the *Report* was devoted exclusively to the issue of the ERA. Schlafly started testifying before state legislatures. She testified in Georgia, Virginia, Missouri, and Arkansas. All four states rejected the amendment. Schlafly was the first to come out with a strong, formalized stance against the ERA. In late 1972, she established the National Commit-

tee to Stop the ERA. By January 1973, the organization had several thousand members in twenty-six states.

The organized Right also began to speak out against the amendment in 1973: John Birch Society, DAR, National Council of Catholic Women, Conservative Caucus, Liberty Lobby, Ku Klux Klan. New organizations were established—WWWW, HOW, AWARE, FLAG. In 1975 Schlafly established the Eagle Forum and the *Eagle Forum Newsletter*, which communicated a simple, moralistic message to women—often highly distorted. Distortion was possible and believable because the meaning and the intention of the ERA was unclear, even among feminists.

Schlafly established several grounds for her early opposition, and she continued to develop new arguments throughout the course of the campaign: she opposed the second section of the amendment, which gave Congress the power of enforcement. When Schlafly pointed out to state legislatures that section II threatened to transfer some 70 percent of their legislative power to the federal government, it was not hard to get legislators to vote against the amendment. Also, the ERA demanded absolute equality with no amendments, no exceptions. Schlafly argued that this would weaken the traditional family and undermine the security of the middle-aged full-time homemaker with no job skills. (The ERA did not include a "grandmother clause.") Schlafly also warned of the potential effect on institutions—women's colleges, protective labor laws, and the military draft. Finally, she linked the ERA to the two most controversial issues of the women's movement—abortion and lesbianism. Some feminists sought to deny this connection, but in fact to many, if not most, feminists, equal rights meant the right to control their own bodies and the right to sexual preference. This may not have been the original view of the 1960s liberal reformers, but by the 1970s, the movement had shifted to the left.

By 1977—the year of the Houston Conference—it was clear that the ERA was in trouble. Therefore, over the next several years there was a major attempt to extend the deadline, led by Ellie Smeal of NOW and ERAmerica (established by the International Women's Year Commission in 1976). The extension was achieved, but of course the ERA was not. The time ran out in 1982.

Understanding Why ERA Lost: Why Defeat?

The ERA was tied to the political rhetoric of the women's movement and became a victim of the backlash directed against feminism and the counter-culture spawned by the sixties social movements, but without feminism, the ERA would never have emerged at all.

There was general confusion over the importance of the ERA and the kind of substantive changes that would occur. For instance, some liberal feminists viewed the ERA as a simple political reform that would guarantee women's legal equality under the Constitution as citizens of the U.S. They argued that the amendment was only a natural extension to women of the political rights that men had always taken for granted. The strategy of the liberal ERA campaign was to down play any significant change in sex roles and to argue that the conservative opposition's use of controversial issues was irrelevant and/or ridiculous.

Under the narrow definition of the ERA, was the struggle worth all the fuss? Many women—blacks and other minorities, poor women, radical feminists, and lesbians—thought otherwise. Many of these women were not part of the network that had developed around the ERA. They sought more radical changes in the status of women.

On the other hand, many proponents exaggerated and chose to interpret the ERA as delivering radical results: the ERA would require the military to send women draftees into combat on the same basis as men. (The war powers clause of the Constitution exempts the military from the Bill of Rights. Women probably would have been subject to the draft under the ERA but not subject to combat under the same terms as men.) Of course, opponents of the ERA also tended to exaggerate the importance of the amendment in bringing about substantial change.

Public support for the amendment was superficial. It was support for abstract rights, not for real change. And contrary to widespread belief, support for the ERA did not increase during the course of the ten-year struggle. It actually declined because it was superficial and susceptible to the conservative backlash.

Also, during the 1970s, the Supreme Court began to use the Fourteenth Amendment to declare unconstitutional almost all laws and practices that Congress had intended to make unconstitutional when it passed the ERA in 1972. The exceptions were laws and practices that most Americans approved of. Thus, by the late 1970s, it was hard to show that the ERA would have made any of the substantive changes that most Americans favored.

In addition, there was growing legislative skepticism about the consequences of giving the U.S. Supreme Court authority to review legislation. Suspicion of the Supreme Court, and the role of judges and lawyers generally, played a significant role in the ERA's demise. Much of the public, by the mid-1970s, viewed the Court as "out of control" on many issues (i.e., civil rights, especially busing; criminal justice, rights of criminals; and *Roe v. Wade*). Many state legislators were unwilling to give the Court "new words to play with," because they feared that this could eventually have all sorts of unforeseeable consequences they might not like and would not be able to reverse.

Finally, the conservative backlash against feminism with the growth of the New Right was the major reason for the defeat of the ERA. For many conservative Americans, the personal became political for the first time when questions of family, children, sexual behavior, and women's roles became subjects of political debate. These issues provided a link between the Right and the fundamentalist churches. These churches had great political power in state legislatures and were able to mobilize a group, traditional homemakers, that had lost status over the past two decades and was feeling the psychological effects of that loss.

As fundamentalist women became more prominent in the opposition, the ERA came to be seen as an issue that pitted women against women—women of the Left against women of the Right. Once the ERA lost its aura of benefiting all women and became a partisan issue, it lost its chance of gaining the supermajority required for a constitutional amendment.

Assessing the Impact of ERA

The impact of the ERA on the women's movement was ambiguous. As a crusade for justice, it was a great force for mobilization. But defeat led to disillusionment. In the 1980s there has been a marked tendency for women, even feminists, to back off from their demands for equality, or at least to redefine equality in less threatening terms than those of the 1970s.

Also, the confusion over the meaning and importance of the ERA was never satisfactorily resolved. The direct effects of the ERA would probably have been slight, but its indirect effects on both judges and legislators would probably have led in the long run to interpretations of existing laws and enactment of new laws that would have benefited women. Although passage of the ERA may have had a positive effect on the climate of opinion toward and among women, the struggle for actual equality would have continued on a case by case and would have required the same vigilance and activism on the part of women that it requires today.

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